Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

MICHAEL A. SCOTT, *pro se*
TERRY A. SCOTT, *pro se*

Petitioners

v.

SAMUEL I. WHITE, P.C., et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

The trial court dismissed this case against the Scotts finding that they were in violation of an order rendered in a criminal/civil contempt proceeding only against Michael Scott by the Circuit Court of the City of Norfolk, Virginia ("October order") for filing this case in violation of an earlier pre-filing injunction that court entered against him on July 2, 2001 ("2001 order"). Mrs. Terry A. Scott was not a party to the contempt proceeding or the earlier 2001 proceeding from which the 2001 order was rendered. Mrs. Scott was not named in the October order that the trial court ruled the Scotts had violated. The trial court did not give notice or opportunity to be heard to the Scotts or to 3 of the defendants over whom it never acquired personal jurisdiction (but on whose behalf it dismissed the case) that it was considering finding the Scotts in violation of the October order prior to its *sua sponte* dismissal for that reason. The Scotts contend, however, that the sanctions imposed against Scott in the October order were criminal, not civil, in nature as the Norfolk Court concluded.

1. Did the trial court's *sua sponte* finding that the Scotts were in violation of the October order, and dismissal of this case on that basis without notice or opportunity for a hearing to them, violate their due process and equal protection rights under the Fourteenth Amendment?

2. Did the trial court's reliance on the October order as the basis for dismissing the instant case against both Scotts impermissibly enforce criminal sanctions against the Scotts in violation of their due process and equal protection rights under the Fourteenth Amendment?

3. Did Michael Scott have a vested right and or protected property interest in the October order entitling him to take the action he was ordered to take, and if so, did he have a protected property interest given under Virginia statute to dismiss his case by nonsuit and was he deprived of that property interest in violation of his due process and equal protection rights under the Fourteenth Amendment?

4. Did the trial court err in enforcing against petitioner Mrs. Terry A. Scott in this case the October order to which she was not a party and was not named in or subject to the underlying 2001 order that was the basis for the contempt proceeding, and did the trial court deprive her of the due process and equal protection guaranteed by the Fourteenth Amendment and of her First Amendment right to petition the trial court with her grievance?

5. Did the trial court have the power in equity to dismiss the Scotts' case against (but favorable to) defendants over whom it never acquired personal jurisdiction and did not participate

in the contempt proceedings against Michael Scott, and was the October order on which the trial court relied unconstitutionally vague, ambiguous and overly broad?

6. Did the Scotts have a protected property interest in certain of the respondents' statutory default in the trial court that accrued while those respondents pursued the contempt citation against Michael Scott, and if so, were the Scotts deprived of that interest in violation of their due process and equal protection rights under the Fourteenth Amendment?

LIST OF PARTIES

A. The Names Of The Petitioners

MICHAEL A. SCOTT
TERRY A. SCOTT

B. The Names Of The Repondents

SAMUEL I. WHITE, P.C.
US BANK, NA
DLJ MORTGAGE CAPITAL, INC.
GE MORTGAGE SERVICES, LLC
WELLS FARGO BANK, NA
WELLS FARGO HOME MORTGAGE, INC.
MERS CORPORATION, INC.
PRIME EQUITY, LLC
EDWARD BARCLIFF, JR.
JASON HAMLIN

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OPINIONS BELOW

The Supreme Court of Virginia entered an order denying the Scotts' petition for rehearing on November 12, 2009. (App. 1). The Supreme Court of Virginia entered an order denying the Scotts' petition for appeal on July 28, 2009. (App. 2). The Circuit Court of the City of Virginia Beach, Virginia entered a final order dismissing the Scotts' case with prejudice on February 25, 2009. (App. 3-5).

JURISDICTION STATEMENT

Pursuant to Supreme Court Rule 10 and 28 U.S.C. § 1257(a), petitioners petition for writ of certiorari to the Supreme Court of Virginia because that Court, in finding no reversible error with the trial court's final order, and the trial court have made rulings that are repugnant to the First Amendment and Fourteenth Amendment and the petitioners' rights there under.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, U. S. Const. Amend. XIV, which states, in relevant part:

> "No...State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

First Amendment, U. S. Const. Amend. I, which states, in relevant part:

"Congress shall make no law...prohibiting...the right of the people...to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

On July 2, 2001, petitioner Michael A. Scott ("Scott") was enjoined by order of the Circuit Court of the City of Norfolk, Virginia ("2001 order") from making any filings whatsoever in the courts of the Commonwealth of Virginia without first obtaining permission from that Court. (App. 6-8). On or about June 9, 2008, Scott and his wife, petitioner Terry A. Scott ("Mrs. Scott") jointly filed the instant case.

This case concerned two pieces of real estate they once owned at 4753 Longmont Road, Virginia Beach, Virginia 23456 ("Longmont Road property") and at 602 Zephyr Court, Virginia Beach, Virginia 23462 ("Zephyr property"). Both properties were supposedly foreclosed, the former in February 2008 and the latter in July 2003. In this case with regards to the Longmont Road property, both Scotts joined in the filing of that claim, but with regards to the Zephyr property, only Mrs. Scott filed that claim in this case as separately set out in the complaint. (App. 9-38).

In the complaint, the Scotts jointly sued respondents Samuel I. White, P.C., US Bank, NA, Wells Fargo Bank, NA, Wells Fargo Home Mortgage, Inc., DLJ Mortgage Capital, Inc., MERS Corporation, Inc. (fka Mortgage Electronic

Registration Systems, Inc.) and Jason Hamlin (excluding MERS, herein referred to as "interveners") regarding the Longmont Road property. Mrs. Scott only sued Samuel I. White, P.C., Wells Fargo Home Mortgage, Inc., GE Mortgage Services, LLC, Prime Equity, LLC and Edward Barcliff, Jr. regarding the Zephyr property. The trial court never acquired personal jurisdiction over MERS, Prime Equity or Mr. Barcliff, but the trial court dismissed the case against them as well.

Shortly after the filing of this case, the Scotts' sought injunctive relief in the trial court seeking to enjoin an unlawful detainer action US Bank, NA filed against them in the Virginia Beach General District Court. The interveners appeared on July 8, 2008 and successfully contested the Scotts' request for injunctive relief. Samuel I. White, P.C. and Mr. Hamlin did file a motion to dismiss in the trial court. The corporate interveners invoked the jurisdiction of the trial court again when they filed discovery objections in August 2008.

Contending that Scott violated the 2001 order, rather than file responsive pleadings to the suit filed in this case, the interveners sought intervention in the Norfolk Circuit Court ("Norfolk Court") case from which the 2001 order arose. The Norfolk Court conducted civil and criminal contempt proceedings against Scott, but only found him in civil contempt by the October order (App. 39-43). Mrs. Scott was not a party to or participant in the contempt proceedings and received no notice of them. The Norfolk Court imposed in excess of $40,000 in attorney's fees against Scott and ordered him to

dismiss "all matters filed by him" in the Virginia Beach Circuit Court and to withdraw any affirmative requests for relief he made in the unlawful detainer action US Bank, NA filed against the Scotts in the Virginia Beach General District Court and to withdraw his objections to foreclosure accounting made with the Commissioner of Accounts of Virginia Beach. Attempting to comply with the October order in this matter, Scott filed a motion in the trial court seeking to nonsuit this case pursuant to Virginia Code § 8.01-380. Dissatisfied with Scott's attempt to dismiss the case "filed by him," the petitioners, except MERS, Prime Equity and Mr. Barcliff, nearly two months after the October order was issued filed an objection to Scott's motion for nonsuit seeking instead dismissal of the entire case against the Scotts.

The trial court granted the motion to dismiss and dismissed the entire case, not only against the defendants who appeared, but against those defendants over whom it never acquired personal jurisdiction in this case. The trial court in its final act and final order specifically found that it was the intent of the October order to apply to both Scotts and found that both Scotts were in violation of that order in this case, notwithstanding that Scott was attempting to comply with the October order with his motion for nonsuit.

In response to the objection made to Scott's motion for nonsuit, the Scotts raised issues regarding due process, equal protection and court petitioning rights. The trial court essentially ignored the Scotts' constitutional arguments and

dismissed the case. In their petition for appeal, Questions Presented 1, 3, and 5 through 8, the Scotts raised in the Supreme Court of Virginia the same due process, equal protection and court petitioning rights ignored by the trial court. Because it was the final act of the trial court which violated the Scotts' constitutional rights, they raised in certain of the aforementioned questions additional issues regarding denial of constitutional due process, equal protection and court petitioning rights by the trial court. Because the Scotts believed that the Supreme Court of Virginia failed and refused to apply its own precedent and the precedent of this Court in this case, the Scotts' raised in their petition for rehearing constitutional due process, equal protection and court petitioning rights based on that Court's actions. The Supreme Court of Virginia found no error with the trial court's actions, and apparently no error with its own actions, and denied the Scotts' petition and petition for rehearing without opinion.

REASONS FOR GRANTING THE PETITION

The petition should be granted because the courts of the Commonwealth of Virginia, especially the trial court's final actions taken *sua sponte,* have violated the Scotts rights protected by the First Amendment and Fourteenth Amendment and in so doing enforced criminal sanctions upon which was based the courts' rulings and orders that are contrary to the First Amendment, Fourteenth Amendment and the jurisprudence of this Court; and that are in conflict with similar jurisprudence of the federal courts of appeal and of the jurisprudence of other state supreme courts. The 2001 order on

which the contempt proceedings were based was void and violated the due process clause of the Fourteenth Amendment and was a prior restraint that violated the First Amendment and, therefore, should not have led to the civil contempt conviction and dismissal of this case.

The Scotts have been denied due process and equal protection and the right to petition the state court by the state's courts. It is the conduct of the state's courts that has fouled the First Amendment and the Fourteenth Amendment and the Scotts protected rights there under. *See Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (private party deprivation has been judicially enforced). This is the only federal forum in which the Scotts could seek protection of their federal constitutional rights in this case.

Notwithstanding the Norfolk Court's characterization of the contempt finding against Scott as civil contempt in the October order, the relief ordered was criminal and punitive in nature under well-settled jurisprudence of this Court. Because the relief was punitive, the trial court's reliance on the October order as the basis for dismissing this case, especially against Mrs. Scott, as its final action denied the Scotts due process and equal protection.

Mrs. Scott was not prohibited by any order, but especially the 2001 order, from filing this case. She was not given notice of the contempt proceedings and did not participate in them. The trial court gave her no notice that it was

contemplating expanding the October order (which did not name Mrs. Scott) to bar her from pursuing her interests in this case. And yet, in the final action of the trial court, it announced for the first time that it was the intent of the October order to preclude her case and that she and Scott were in violation of that order without notice and opportunity to be heard given to either of them before making that ruling and sanctioning them by dismissing this case.

The trial court dismissed this case against all defendants, including those 3 over whom it never acquired personal jurisdiction under its equity jurisdiction. This action fouled well-settled principles of law that a court cannot render a valid judgment in equity unless it has acquired personal jurisdiction over all of the parties whose rights were affected by the judgment. The defendants', MERS, Prime Equity and Mr. Barcliff, rights were affected by the trial court's final order. Mrs. Scott's rights were affected by the October order, ***as expressly and only found by the trial court,*** when she was not named in the order and did not participate in the contempt proceeding. In either instance, the Scotts were denied due process and equal protection under the Fourteenth Amendment.

Point 1 The October Order Imposed Criminal Penalties That Were Impermissibly Enforced

The October order in which the Norfolk Court found Scott to be in civil contempt ordered against him the following relief stating, in part:

- "that within five (5) days of the date of entry of this Order Scott shall dismiss all matters filed by him pending in the Circuit Court of the City of Virginia Beach and shall withdraw all requests for any type of affirmative relief that may have been filed by him in any pending case, including before a Commissioner of Accounts regarding the foreclosure accounting and in the unlawful detainer action pending in the General District Court for the City of Virginia Beach."

- "that any permission given Scott by this Court to defend against the foreclosure in Virginia Beach, including any permission given pursuant to this Court's order of January 31, 2008, is withdrawn due to his abuse of the process of the Court and harassment of other persons."

- "that pursuant to Virginia Code § 8.01-271.1, Scott shall pay to petitioners, through their attorney, the sum of $40,330.59 as attorney's fees and costs incurred herein."

- "that the parties shall appear before this Court on Wednesday, November 5, 2008, at 2:00 p.m., to determine whether the Court's rulings contained herein have been met under penalty of criminal sanctions."

October Order, (App. 39-43).

It is well-settled that there are but two types of relief that can be adjudged for contempt, remedial

for the benefit of the complainant or criminal for vindication of the court's authority. A court can make remedial relief conditioned upon the contemnor performing some action required to be performed by the court's contempt order. Principles set forth in three leading opinions of this Court provide guidance on determining whether the relief stated in the October order was remedial or criminal: *Hicks v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988), *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed. 642 (1994) and *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

Filing of this case by Scott was a "completed act of disobedience." *Gompers*, 221 U.S. at 443, 31 S.Ct. at 498. "When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect." *Mine Workers*, 512 U.S. at 830. Scott's "isolated, prohibited act" for which he was found guilty of contempt was his completed act of filing this case. The character of the 2001 order was criminal and prohibitive and Scott's actions violating that order could only have been deemed criminal with attending criminal sanctions.

The sanctions imposed in the October order were not remedial and had no coercive effect under the standards set by this Court in the foregoing and other precedent and, therefore, had the effect of vindicating the authority of the Norfolk Court. Of course, the interveners did benefit from the sanctions imposed, but that should not be the

guiding principle. Ordering Scott to unconditionally dismiss his claims in this case and to withdraw his affirmative requests for relief in the Virginia Beach General District Court and with the Commissioner of Accounts of Virginia Beach were criminal sanctions. *Harris v. City of Philadelphia*, 47 F.3d 1311 (3rd Cir. 1995) (dismissal of motion to modify in civil contempt was criminal sanction); *Hicks v. Feiock*, 485 U.S. at 635, n. 7, 108 S.Ct. at 1431, n. 7 ("The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order.").

It was not insignificant that the Norfolk Court did not make the sanctions it imposed on Scott conditional under a threat of explicitly defined consequences of not doing what the 2001 order required. In other words, the Norfolk Court did not state that Scott's noncompliance with the October order would result in him being jailed or fined until he complied, i.e., the proverbial "carries the keys of his prison in his own pocket" notion articulated in *Gompers*, 221 U.S. at 442, 31 S.Ct. 498. *See* also *Shillitani v. United States*, 384 U.S. 364, 370-71, 86 S.Ct. 1531, 1535-36, 16 L.Ed.2d 622 (1966) (civil contempt is imposed for remedial purpose if court conditions release from imprisonment upon contemnor's willingness to testify) and *United States v. United Mine Workers*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947).

The October order did require the parties to return to the Norfolk Court for it to determine whether Scott had complied with the order "under penalty of criminal sanctions." This requirement did not change the character of the sanctions into remedial sanctions. As a side note, the Norfolk Court at that hearing ***did not*** find that Scott, and certainly not Mrs. Scott, was in violation of the October order because Scott was in the process of filing his motion for nonsuit in the trial court and withdrawing relief requests in the unlawful detainer action and with the Commissioner. Nevertheless, to impose such criminal sanctions for Scott's noncompliance with the October order, the Norfolk Court would have to have found Scott in criminal contempt as a result of a separate proceeding regarding his noncompliance with the October order, not the 2001 order. Therefore, this part of the October order cannot justify the sanctions imposed being classified as remedial and a form of coercing Scott's compliance with the 2001 order.

This distinction impacts this case for three reasons: 1) sanctions imposed in the October order to vindicate the Norfolk Court's authority could not have been enforced by the trial court under its inherent authority or at all without usurping executive branch authority; 2) such sanctions could not be imposed against Mrs. Scott and the trial court could not have found that she was in violation of a criminal order in which she was not named the criminal defendant; and 3) unless and until *Scott* actually "dismiss[ed] all matters filed by him pending in the Circuit Court of the City of Virginia Beach" as required by the October order, he was

(and is to this day technically) subject to a "penalty of criminal sanctions" and the trial court's *sua sponte* dismissal of this case has thrust Scott into perpetual jeopardy of technical noncompliance with the order under continuous "penalty of criminal sanctions." Reliance on the October order by the trial court to dismiss this case was impermissible and effectively denied the Scotts due process and equal protection.

The trial court's final act in finding the Scotts to be in violation of the October order and dismissing the case for that reason in effect imposed a criminal penalty against them with the dismissal for the violation. It is beyond question that the trial court could not take this course of action, particularly against Mrs. Scott who was not a party to the contempt proceeding and was not named in the October order. *See Bessette v. Conkey Company,* 194 U.S. 324, 24 S.Ct. 665, 48 L.Ed. 997 (1904) ("Yet, being no party to the suit [Mrs. Scott] was found guilty of an act in resistance of the order of the court. H[er] case, therefore, comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a court room or disobedience of a subpoena, as among those acts primarily directed against the power of the court.").

Lastly, the trial court should have given the Scotts notice and opportunity to be heard that it was considering them to be in violation of the October order, especially when Scott had already filed his motion to nonsuit the "matters filed by him" (and the motion was opposed by the respondents) and especially when Mrs. Scott was not a party to the

contempt proceeding that led to the October order. The finding that the Scotts were in violation of the October order was an entirely separate matter and dismissal of this case based on that finding was a punitive sanction that should have invoked procedural due process protections accorded criminal proceedings. The trial court did not give the Scotts any notice or opportunity to respond to its consideration of them being in violation of the October order prior to its *sua sponte* finding. The Virginia courts, therefore, denied the Scotts due process. Furthermore, upon the imposition of a criminal sanction against the Scotts after finding *sua* sponte that they were in violation of the October order under inherent authority, "the mode of procedure employed by the [trial] court was such as it might not lawfully adopt." *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998). As a matter of settled Virginia law, the trial court's dismissal order is void *ab initio* and may be "impeached directly or collaterally by all persons, anywhere, at any time, or in any manner." *Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001).

Point 2 **The 2001 Order Imposing The Pre-Filing Injunction Against Scott Violated The Due Process And Equal Protection Clauses Under The Fourteenth Amendment And Was A Prior Restraint That Violated The First Amendment**

A. Due Process Clause

The 2001 order imposing the pre-filing injunction against Scott did not comport with due process and provide Scott with adequate notice. The part of the 2001 order imposing the pre-filing injunction against Scott stated—

> "Michael A. Scott is hereby enjoined from filing any further actions, suits, motions or other proceedings in any Court of this Commonwealth without first obtaining leave of this Court."

The pre-filing injunction part of the 2001 order was vague and ambiguous and the manner in which it was applied to Scott at the request of strangers (interveners) to the original proceeding violated the due process clause and Scott's due process rights. It is clear that this part of the 2001 order was an express prohibition, in the nature of a "criminal" order or criminal statute imposed exclusively to regulate Scott's access to the Virginia courts for any reason whatsoever. *Mine Workers v. Bagwell*, 512 U.S. 821, 835, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); *Hoover v. Wagner*, 47 F.3d 845, 849 (7th Cir. 1995) (noting that "[i]njunctions often do function like statutes."); *Cheffer v. McGregor*, 6 F.3d 705, 708 (11th Cir. 1993), vacated on other grounds, 41 F.3d 1421 (11th Cir. 1994) (en banc) (finding state court injunction to be statutory in character).

The prohibitive character of the 2001 order, to comport with due process, should have "annex[ed] a penalty" or informed Scott of the consequences of violating the order. *Parker v. Commonwealth*, 42 Va. App. 358, 592 S.E.2d 358 (Va. App. 2004) (citing

Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917)). Furthermore, the 2001 order failed to offer any guidance to Scott or to the judges of the Norfolk Court who would interpret the order as to what was meant by and required of Scott by use of the language "without first obtaining leave of this Court." This language was vague, ambiguous and overly broad and its enforcement against Scott at the request of the interveners could not be the basis for a contempt finding. Therefore, the October order finding Scott in civil contempt was void and the final order dismissing this case based on the October order was void. Because the 2001 order was vague, ambiguous and overly broad as applied to Scott, it violated the due process clause and his due process rights.

B. Equal Protection

"The Equal Protection Clause ensures that all persons similarly situated should be treated alike." *Squaw Valley Dev. Co. v. Goldberg,* 375 F.3d 936, 944 (9th Cir. 2004) (Citation omitted). This Court formally recognized a class-of-one equal protection action. *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). As noted, the 2001 order imposing the pre-filing injunction was prohibitory in character and imposed solely to regulate Scott's access to the Virginia courts.

At the time the 2001 order was entered by the Norfolk Court, the law regarding pre-filing injunctions in Virginia was well-settled. The 2001 order "should [have] set forth what [was] enjoined in

a clear and certain manner and its meaning should not be left for speculation or conjecture" and "must be specific in its terms, and it must define the extent of its operation so that there may be compliance." *Unit Owners Ass'n of BuildAmerica-1 v. Gillman*, 223 Va. 752, 770, 292 S.E.2d 378, 387 (1982). The 2001 order, especially the language "without first obtaining leave" without more did not comply with this standard, but Scott was entitled to the application of this standard in imposing, and any enforcement of, the 2001 order against him. *Sylvia Development Corp. v. Calvert County, MD*, 48 F.3d 810 (4th Cir. 1995) (The equal protection clause "requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose."). Therefore, the 2001 order violated the equal protection clause, and as the order was applied to Scott at the request of strangers to the original proceeding to result in the October order, violated his equal protection rights.

C. Prior Restraint

The 2001 order was rendered under the Norfolk Court's equity jurisdiction. The aim of the Norfolk Court was to regulate Scott's ability to file suits in the Virginia courts. However, the 2001 order went way further and impermissibly prohibits Scott from making any filings of any type in any Virginia court, as plaintiff or defendant, in a civil or criminal matter.

A "prior restraint" exists when speech is conditioned upon the prior approval of public

officials. *See, e.g.,* *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S.Ct.1239, 43 L.Ed. 448 (1975) (denial of use of public forum without procedural safeguards is unconstitutional prior restraint). Prior restraints carry a heavy presumption of unconstitutionality. *Batam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

The censorship of Scott's access to Virginia's courts without any guidance provided in the 2001 order as to how to obtain access in a civil or criminal matter, as a plaintiff or defendant, vested in the Norfolk Court judges unbridled and potentially varying discretions of those judges the issue of whether Scott would ever be permitted court access. Needless to say, Scott would be subject to delay in being able to defend himself until he obtained permission to do so. Moreover, the Norfolk Court could not under inherent power restrict Scott's court access in a criminal related matter for any reason without fouling the First Amendment and Fourteenth Amendment.

The character of the 2001 order affecting in any way Scott's ability to effectively defend himself, particularly in a criminal matter, was not such as the Norfolk Court had the power to render under inherent power and is void *ab initio.* Because the 2001 order did not distinguish between civil and criminal matters and prohibits Scott's access to the courts of Virginia as a defendant, the order constitutes a prior restraint that violated the First Amendment and violated the due process clause of the Fourteenth Amendment.

Point 3 **Scott Had A Vested Right And Property Interest In His Being Able To Comply With The October Order**

Whether the sanctions imposed in the October order are characterized as remedial or criminal, Scott had a vested right and property interest in his being able to comply with the order. *Benjamin v. Jacobson*, 124 F.3d 162 (2nd Cir. 1997) (It is well-settled that a final money judgment creates a vested right and hence a constitutionally protected property interest); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805 (11th Cir. 1988) (rights fixed by judgment are, in essence, a form of property); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995); *Cullough v. Commonwealth of Virginia*, 172 U.S. 102, 19 S.Ct. 134, 43 L.Ed 382 (1898); *Morency v. Commonwealth*, 274 Va. 569, 649 S.E.2d 682 (2007). The October order placed Scott's noncompliance under a threat of criminal sanctions which remains to this day because Scott did not "dismiss matters filed by him," but rather the trial court did so without notice or opportunity for hearing on the ground that he and Mrs. Scott were in violation of the October order, thus, depriving Scott of his ability, protected and vested right and duty to comply with the order as written with his motion for nonsuit.

In his attempt to comply with the October order and "dismiss matters filed by him" as specifically required by the order, Scott sought to nonsuit this case pursuant to Virginia Code § 8.01-380. This statute gave Scott the right to nonsuit his case and all of the conditions required by the statute

were met giving him this exclusive right. Nonsuit is a dismissal under Virginia law. *Norwood v. Buffey*, 196 Va. 1051, 1055, 86 S.E.2d 809, 811 (1955) ("A dismissal (not upon the merits) is a nonsuit."). Interpreting § 8.01-380, the Virginia Supreme Court stated: "The election is his and if he insists upon taking the nonsuit within the limitations imposed by the statute, neither the trial court nor opposing counsel can prevent him from doing so." *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1984).

If the October order was truly remedial, then the point of the order should have been to restore matters back to the state that existed before Scott filed this case, i.e., when Scott was not in litigation with the respondents in this matter. Scott's attempt to exercise his statutory right to dismiss "matters filed by him" by nonsuiting this case under § 8.01-380 was the only type of equitable dismissal that would "leave[] the situation as if the suit had never been filed" by Scott. *Ipsen v. Moxley*, 49 Va. App. 555, 642 S.E.2d 798 (Va. App. 2007). Scott had no right or authority to dismiss matters filed by Mrs. Scott. *See United States v. International Brotherhood of Teamsters*, 899 F.2d 143 (1990) ("a contempt order [could not] require the contemnor to overstep his lawful authority") and cases cited.

Because Scott's right to nonsuit his case was granted by Virginia statute, this created a constitutionally protected property interest to which he had a "legitimate claim of entitlement." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The trial court, in denying Scott the right to exercise this

protected statutory right, and it's and the Supreme Court of Virginia's failure to apply that Court's settled law noted above to the facts of this case deprived Scott of due process and violated his equal protection rights, and also forced Scott into a perpetual and present inability to comply with the letter of the October order as ordered.

Point 4 **The Trial Court Violated The Scotts Due Process And Equal Protection Rights When It Ruled *Sua Sponte* That They Were In Violation Of The October Order**

The last act of the trial court was to find *sua sponte,* without prior notice or opportunity to be heard, that the Scotts were in violation of the October order and dismissed this case based on that holding. The contempt proceeding against Scott in the Norfolk Court resulted in that Court rendering the October order finding Scott, ***not Mrs. Scott,*** in civil contempt. The 2001 order on which the contempt proceeding against Scott was based enjoined Scott, ***not Mrs. Scott,*** from making filings in the courts of Virginia. Mrs. Scott asserted in this case a claim jointly with Scott related to the Longmont Road property and a claim solo related to the Zephyr property.

Mrs. Scott did not participate in the contempt proceeding and was not given notice of that proceeding. The October order did not mention Mrs. Scott by name or otherwise. Mrs. Scott was not subject to the 2001 order either. When the trial court ruled *sua sponte* that Mrs. Scott was in

violation of the October order, it essentially, by such action, determined that the October order applied to her in effect saying without saying that she was equally responsible for Scott's violation of the 2001 order. Notably, there was no finding by the trial court or by the Norfolk Court that Mrs. Scott violated the 2001 order. "[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930). It appropriately follows that the Norfolk Court in its October order could not bind the order's effect on Mrs. Scott since she was not a party to the contempt proceedings, and it also follows that the trial court's ruling that it was the intent of the October order was beyond its authority to make. In this regard, Mrs. Scott was treated differently than any other litigant with legitimate grievances petitioning Virginia's courts and who has never contravened any court orders or rules or laws of the Commonwealth of Virginia. There was no legitimate governmental interest in denying Mrs. Scott her right to litigate her protected interests just because she happen to petition Virginia's court with such grievances in the same complaint with her husband, Scott, who was ***subsequently*** found to have violated a prior court order. *Village of Willowbrook v. Olech, supra.* As a consequence, Mrs. Scott was denied equal protection by the final actions of the trial court.

Perhaps the most troubling about the trial court's ruling was that it ruled that the Scotts were in violation of the October order *sua sponte* as its final act without notice or opportunity to be heard

given to them by the trial court about being in violation of the order, particularly when the respondents never asked the trial court to make such a finding. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (Due process of law generally requires that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."). Indeed, it was the final act of the trial court, but especially the actions of the Supreme Court of Virginia in denying the Scotts' petition and petition for rehearing, that raise the specter of the courts' denial of the Scotts' substantive due process rights. In addition, Mrs. Scott was not mentioned by name or otherwise in the October order. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires." *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (citations omitted).

Mrs. Scott has never been found to have committed any legal wrongs nor anything improper in relation to the October order or the 2001 order prior to the trial court's *sua sponte* final action finding her to be in violation of the October order. *Bacon v. City of Richmond*, 475 F.3d 633 (4th Cir.

2007) (As with any equity case, the nature of the violation determines the scope of the remedy. Remedies, in other words, do not exist in the abstract; rather they flow from and are the consequence of some wrong. At its most basic, this principle limits the reach of judicial decrees to parties found liable for a legal wrong....In sum, a legal violation is a necessary predicate for entry of a remedial order.); *Mylo v. Bd. of Educ. Of Baltimore City*, 948 F.2d 1282 (4th Cir. 1991) (unpublished) (dismissal inappropriate to punish party not responsible for misconduct).

The respondents' objection to nonsuit was directed at Scott's motion for nonsuit of which Mrs. Scott was not a part and never sought to nonsuit her case. The respondents' objection to nonsuit did not specifically request any relief against Mrs. Scott. *Johnson v. Buzzard Island Shooting Club, Inc.*, 232 Va. 32, 37, 348 S.E.2d 220, 223 (1986) (holding that trial court may not grant relief to a party inconsistent with the case alleged in the party's pleading). The trial court invoked inherent power and dismissed Mrs. Scott's case on its own and not based on any specific request for relief from any of the respondents, especially the 3 over whom it never acquired personal jurisdiction, and in so doing, deprived her of due process because it gave neither notice nor opportunity to be heard prior to awarding the respondents that relief.

It is so well-settled in the jurisprudence of this Court and even of the Supreme Court of Virginia that constitutional due process requires notice and opportunity to be heard be given a person before that

person could be deprived of their property interest. *Parish v. Spaulding*, 26 Va. App. 566, 576, 496 S.E.2d 91, 96 (1998) ("Due process requires that, before a court may deprive a party of a property or liberty interest, the party must receive notice and the opportunity to be heard"); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884). Mrs. Scott clearly had a constitutionally protected property interest in her two claims in this case. The trial court's depriving her of these claims based on it applying the October order to bar her claims has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to any governmental interest depriving her of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (The core of the concept of substantive due process is the "protection of the individual against arbitrary action of government," i.e., protection against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective.").

Furthermore, as noted above, only Mrs. Scott filed the claim in this case regarding the Zephyr property. Even if it was appropriate (and it was not) for the trial court to dismiss the claim in which Mrs. Scott jointly filed with Scott, the trial court should not have dismissed the claim related to the Zephyr property, which was against the parties over whom the trial court did not acquire personal jurisdiction and was not a matter filed by Scott. Mrs. Scott was plainly deprived of due process by the trial court's final act of finding *sua sponte* that she was in violation of the October order without giving her

notice that such action was being contemplated and an opportunity to respond before such action was taken. *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."); *Caldwell v. Taggart*, 29 U.S. 190, 4 Pet. 190, 7 L.Ed. 828 (1830).

Pointe 5 **The Trial Court's Final Order Is Void Because It Did Not Have Personal Jurisdiction Over All Of The Necessary Defendants Whose Rights Were Adjudicated By The Final Order**

The respondents invoked the trial court's equity jurisdiction when they filed their objection to Scott's nonsuit. As noted above, neither MERS Corporation, Prime Equity nor Mr. Barcliff appeared before the trial court prior to its final ruling, but each of them was a necessary party whose interests were directly affected by the final order. And yet, the final order dismissed the entire case even in favor of those 3 non-appearing necessary defendants who, because they had not appeared, could not have asked the trial court for such relief. The trial court deprived the Scotts of their due process right to litigate the case against these 3 defendants.

The jurisprudence of this Court and of the Supreme Court of Virginia was well-settled that a court sitting in equity cannot render a valid judgment adjudicating a necessary party's rights unless that court acquired personal jurisdiction over

that party. *Atkinsson v. Wexford Associates*, 254 Va. 449, 455, 493 S.E.2d 524, 527 (1997) ("A court cannot render a valid judgment when necessary parties to the proceedings are not before the court. We have repeatedly articulated this fundamental principle of law."); *Asch v. Friends of Mt. Vernon Yacht Club*, 251 Va. 89, 91, 465 S.E.2d 817, 818 (1996); *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280, 284, 18 L.Ed. 825 (1867). The trial court's final order is void *ab initio* for want of necessary parties—MERS Corporation, Prime Equity and Mr. Barcliff—neither of whom could have possibly requested any relief from the trial court. Finally, the Supreme Court of Virginia's failure to apply its own well-settled principles of law on which the Scotts were entitled to rely violated their substantive due process rights and equal protection rights.

Point 6 **The Scotts Had A Statutory Right To Default Against Certain Petitioners Of Which The Trial Court Deprived Them**

Petitioners US Bank, Wells Fargo Home Mortgage, Wells Fargo Bank, GE Mortgage and DLJ Mortgage failed to timely file responsive pleadings in the trial court, opting instead to pursue the contempt proceeding against Scott in the Norfolk Court. Of course, the corporate interveners did file in the trial court discovery objections while the contempt proceedings were on a separate track in the Norfolk Court. *Maryland Casualty Co. v. Clintwood Bank, Inc.*, 155 Va. 181, 186, 154 S.E. 492, 494 (1930) ("'Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a

general appearance.'"). Thus, the above-named respondents were required to file responsive pleadings within 21 days of their July 8, 2008 appearance in the trial court whereby they successfully opposed the Scotts' request for injunctive relief. *Virginia Supreme Court Rule 3:8.* The Norfolk Court rejected the interveners' request to stay the proceedings in this case in its August 7, 2008 order granting their motion to intervene. (App. 44-47).

Under Virginia Supreme Court Rule 3:19(a), the above-named respondents' failure to file the responsive pleadings required by Virginia Supreme Court Rule 3:8(a), resulted in their default by automatic operation of this rule. "A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 *is* in default." *Virginia Supreme Court Rule 3:19(a).* Emphasis added. As a result, the Scotts became vested with their automatic default as a property interest protected by the due process clause months before the October order was issued. *Board of Regents v. Roth,* 408 U.S. at 577. The trial court denied the Scotts' motion for default at the time of its *sua sponte* dismissal of the case and in so doing denied them both procedural and substantive due process and equal protection.

Point 7 The October Order Was Overly Broad, Vague And Ambiguous And Violated The Due Process Clause

The October order was patently vague, ambiguous and overly broad and the trial court should not have relied on it to base dismissal of this

case. The order required Scott to take the ordered action within 5 days and days 4 and 5 actually fell on the weekend when the trial court was closed for business. Thus, Scott was required to take action he could not take on those two days. The trial court concluded that Scott was in violation of the October order for failing to take action he could not on days 4 and 5 take.

The October order employed numerous vague, ambiguous and overly broad terms such as "dismiss", "all matters filed by him", "pending", "all requests for any type", "any pending case" and "any permission given". Scott had no authority to "dismiss" anything, particularly as to Mrs. Scott's case. Words such as "any" and "all" are patently vague, ambiguous and overly broad terms and the manner in which they were deployed in the October order rendered the entire order vague, ambiguous and overly broad in violation of the due process clause of the Fourteenth Amendment.

CONCLUSION

The issues presented in this petition raise important constitutional questions and questions of law involving this Court's First Amendment and Fourteenth Amendment jurisprudence and jurisprudence relative to a court's exercise of inherent power. It is clear from the foregoing argument that the state's courts violated the Scotts federal and state constitutional rights. Setting aside the state constitutional rights, this is the first and only federal forum in which the Scotts could secure the protection of their federal rights in this case.

For these reasons, the petition for writ of certiorari should be granted. Furthermore, the errors of the lower courts are so clearly against a tide of settled law that summary reversal would be warranted and appropriate in this case.

Respectfully submitted,

Michael A. Scott
Petitioner, *pro se*

Terry A. Scott
Petitioner, *pro se*

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of November, 2009.

Michael A. Scott, et al. Appellants,

Against Record No. 090462
Circuit Court No. CL08-3200

Samuel I. White, P.C., et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 28th day of July, 2009 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/

Deputy Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 28th day of July, 2009.

Michael A. Scott, et al. Appellants,

Against Record No. 090462
Circuit Court No. CL08-3200

Samuel I. White, P.C., et al., Appellees.

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/

Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SCOTT, *pro se,*
TERRY A. SCOTT, *pro se,*

Plaintiffs,

v. CASE NO. CL08-3200

SAMUEL I. WHITE, P.C., et al.,

Defendants.

ORDER

THIS CAUSE came on to be heard on the motions of the plaintiff, Michael A. Scott, for a non-suit and plaintiff, Terry A. Scott, for default judgment and injunctive relief, and objection to non-suit and dismissal filed by defendants.

After reviewing the various pleadings, transcripts and Orders in related proceedings in the Norfolk Circuit Court and the United States District Court for the Eastern District of Virginia, and hearing the arguments of counsel and the plaintiffs, it appears to the Court that the intent of the Order entered by the presiding judge of the Norfolk Circuit Court was to bar all actions by both Michael and Terry Scott relating to the subject matters involved.

The Court finds the plaintiffs are in violation of that Order. It is, therefore, ORDERED as follows:

(1) Plaintiff's motion for non-suit be the same is hereby DENIED;

(2) Plaintiff's motions for default judgment and injunctive relief be and the same are hereby DENIED;

(3) Defendants' objection to non-suit be the same is hereby GRANTED and this case is DISMISSED WITH PREJUDICE.

ENTER: 2/25/09

/s/
Edward W. Hanson, Jr., Judge

WE ASK FOR THIS:

/s/
Stanley G. Barr, Jr.,
Counsel for Defendants,
Samuel I. White, P.C., Mortgage Electronic Registration Systems, Inc., Wells Fargo Bank, NA, DLJ Mortgage Capital, Inc., Wells Fargo Home Mortgage, Inc., GE Mortgage Services, LLC, and Jason Hamlin

/s/
Ronald J. Guillot, Jr.
Counsel for Defendant,
US Bank, NA

SEEN AND OBJECTED TO:

/s/
Michael A. Scott, *pro se plaintiff*

/s/
Terry A. Scott, *pro se plaintiff*

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

MICHAEL A. SCOTT,

Plaintiff,

v. AT LAW NO. L99-351

NORFOLK SOUTHERN CORP., et al.,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT BY DEFAULT AND GRANTING DEFENDANTS' MOTION FOR SANCTIONS AND PRE-FILING INJUNCTION

This day came the Plaintiff, Michael A. Scott, pro se, and Defendants, Norfolk Southern Corporation, et al., by counsel, on Plaintiff's Motion for Entry of Judgment by Default and,

The Court, having fully considered the briefs and oral argument of the parties, ORDERS and ADJUDGES that Plaintiff Motion for Entry of Judgment by Default be, and the same hereby is, DENIED; and

The Court, having fully considered the briefs and oral argument of the parties, finds:

1. That Plaintiff's attempt to invoke this Court's jurisdiction in his Motion for Entry of Judgment by Default is frivolous;

2. That Plaintiff is using the legal process to harass Defendants and has been doing so for a period of years;

WHEREFORE the Court further ORDERS, ADJUDGES and DECREES that Defendants' Motion for Sanctions is hereby GRANTED and that sanctions are imposed upon Michael A. Scott as follows:

1. Defendants are awarded a judgment against Michael A. Scott in the amount of $10,000.00, and the judgment amount is payable to Norfolk Southern Corporation as judgment creditor; and

2. Michael A. Scott is hereby enjoined from filing any further actions, suits, motions or other proceedings in any Court of this Commonwealth without first obtaining leave of this Court.

There being no other matters before the Court, it is ORDERED that this matter shall be, and the same hereby is, concluded and struck from the Court's docket.

ENTER: July 2, 2001

/s/
Judge, Norfolk Circuit Court
Charles E. Poston, Judge

I ask for this:

Samuel J. Webster,
Counsel for all Defendants

Seen and objected to:

Michael A. Scott, Plaintiff

Handwritten note:

At ore tenus hearing on June 26, 2001, the matter was continued to 7/2/01 for entry of order. The plaintiff did not appear.

/s/ C Poston

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SCOTT, *pro se,*
TERRY A. SCOTT, *pro se,*
4753 Longmont Road
Virginia Beach, Virginia 23456

Plaintiffs,

vs.

At Law No. _____
Complaint
Jury Trial
Demanded

SAMUEL I. WHITE, P.C.
c/o William Adam White
Registered Agent
5040 Corporate Woods Drive, Suite 120
Virginia Beach, Virginia 23462

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
c/o Sharon Horstkamp
Registered Agent
1595 Spring Hill Road, Suite 310
Vienna, Virginia 22182

LANDMARK COMMUNICATIONS, INC.
c/o Guy R. Friddell III
Registered Agent
150 West Brambleton Avenue
Norfolk, Virginia 23510

PRIME EQUITY, LLC

c/o Steven Murphy
Registered Agent
636 US Highway 1, Suite 118
North Palm Beach, Florida 33401

WELLS FARGO BANK, NA
c/o CSC Lawyers Incorporating Service
Registered Agent
P. O. Box 526036
Sacramento, California 95852

DLJ MORTGAGE CAPITAL, INC.
c/o Corporation Service Company
Registered Agent
11 South 12TH Street
Richmond, Virginia 23218

WELLS FARGO HOME MORTGAGE, INC.
dba AMERICA'S SERVICING COMPANY
c/o Corporation Service Company
2711 Centerville Road, Suite 400
Wilmington, Delaware 19808

US BANK, NA
c/o C T Corporation System
Registered Agent
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

GE MORTGAGE SERVICES, LLC
c/o The Corporation Trust Company
Registered Agent
Corporate Trust Center
1209 Orange Street
Wilmington, Delaware 19801

JASON HAMLIN
5040 Corporate Woods Drive, Suite 120
Virginia Beach, Virginia 23462

EDWARD BARCLIFF, JR.
1416 Virginia Beach Boulevard
Virginia Beach, Virginia 23454

Defendants.

COMPLAINT

Plaintiffs Michael A. Scott and Terry A. Scott, proceeding *pro se,* state:

I. Claims

Plaintiffs allege claims under Virginia law for actual and or constructive fraud, deceit and misrepresentation, ejectment (Code of Virginia § 8.01-131 *et seq.),* negligent and intentional infliction of emotional distress, breach of fiduciary duty, voidance of foreclosure, fraudulent conveyance (Code of Virginia § 55-80), removal of cloud on title (Code of Virginia § 55-153), voidance of deed of trust lien (Code of Virginia § 55-96), failure to release deed of trust lien (Code of Virginia § 55-66.3), libel, defamation, slander, insulting words (Code of Virginia § 8.01-45), unauthorized use of name (Code of Virginia § 8.01-40), economic duress, abuse of process, malicious prosecution, breach of and tortuous interference with contract, Code of Virginia § 8.01-221 for violation of Virginia statutes, and

unjust enrichment. All of these claims relate to the plaintiffs property located at 4753 Longmont Road, Virginia Beach, Virginia 23456 ("Longmont Road property"). Plaintiffs also seek injunctive relief, pursuant to Code of Virginia § 8.01-620 *et seq.*, in connection with the Longmont Road property. None of the claims related to the Longmont Road property are alleged against GE Mortgage Services, LLC, Prime Equity, LLC or Edward Barcliff, Jr.

II. Parties

A. Plaintiffs are residents of Virginia residing at the Longmont Road property, and were residents of Virginia at all material times relevant to this complaint.

B. Defendant Wells Fargo Home Mortgage, Inc. dba America's Servicing Company ("ASC") is a business entity organized and existing under the laws of the state of California. Defendant Wells Fargo Bank, NA ("Wells Fargo") is the parent of Wells Fargo Home Mortgage, Inc. ("WFHM") and was a transferee for the January 20, 2006 note on the Longmont Road property. Wells Fargo also refinanced the original note on the Longmont Road property. WFHM, at all material times relevant to the foreclosure process on the Longmont Road property [illegible]ly operated and conducted business under the laws of the Commonwealth of Virginia.

C. Defendant US Bank, NA ("US Bank") was a national association with its principal place of business located at 464 California Street, San

Francisco, California 94104 at all material times relevant to the foreclosure of the Longmont Road property. US Bank was the "Trustee for CSAB HEAT 2006-4", a trust, and acting as custodian of the January 20, 2006 note on the Longmont Road property as part of the trust.

D. Defendant DLJ Mortgage Capital, Inc. ("DLJ Mortgage") was a business entity organized and operating under the laws of the Commonwealth of Virginia at all material times relevant to the foreclosure of the property located at 4753 Longmont Road, Virginia Beach, Virginia 23456.

E. Defendant GE Mortgage Services, LLC ("GE Mortgage") was a business entity organized and existing under the laws of the Commonwealth of Virginia and the states of Connecticut and Delaware at all material times relevant to the foreclosure of the plaintiffs property located at 602 Zephyr Court, Virginia Beach, Virginia 23462 (the "Zephyr property"). The claims alleged in this complaint against GE Mortgage relate solely to the Zephyr property. Defendants Jason Hamlin, US Bank, DLJ Mortgage and Wells Fargo are not parties to the claims related to the Zephyr property.

F. Defendant Samuel I. White, P.C. ("SIWPC") is a business entity organized and existing under the laws of the Commonwealth of Virginia. SIWPC was the substitute trustee for the foreclosure process on the plaintiffs' Longmont Road and Zephyr properties.

G. Defendant Prime Equity, LLC ("Prime Equity") was a Florida limited liability company that financed defendant Edward Barcliff, Jr.'s purchase of the Zephyr property in June 2005 and secured the note with a deed of trust lien on the Zephyr property. The only claims alleged against Prime Equity in this complaint relate solely to title for the Zephyr property.

H. Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") was the designated beneficiary under the January 20, 2006 deed of trust on the Longmont Road property, and was the nominee on behalf of Aegis Funding Corporation ("Aegis Funding") and its successors and assigns. MERS was also an assignee of the note from Prime Equity on June 22, 2005 for the Zephyr property, as well as beneficiary under the deed of trust lien for the Zephyr property.

I. Defendant Landmark Communications, Inc. ("Landmark") was a Virginia based company and publisher and parent company of the *Virginian-Pilot* newspaper at all material times relevant to this complaint.

J. Defendant Jason Hamlin ("Hamlin") was an attorney for SIWPC who participated in issuing and prosecuting the wrongful summons for unlawful detainer on behalf of US Bank in the Virginia Beach General District Court for the Longmont Road property and is being sued in his official capacity with SIWPC and in his individual capacity.

K. Defendant Edward Barcliff, Jr. ("Barcliff") is a Virginia resident who purchased the Zephyr property in June 2005 and is the current owner of record for the Zephyr property. The only claims alleged against Barcliff in this complaint relate solely to title for the Zephyr property.

III. Allegations

1. The plaintiffs' original note for their Longmont Road property was assigned to WFHM prior to December 28, 2004. The plaintiffs assumed the original note from Jean S. Cross in May 1993 and a deed of assumption conveying the property to the plaintiffs was executed and recorded in the land records of this Court on or about May 24, 1993. In the deed of assumption, the plaintiffs were the grantees and Ms. Cross was the grantor. This deed of assumption was never released in this Court's land records and remains to date in force in the chain of title for the Longmont Road property.

2. Plaintiffs refinanced the original note on their Longmont Road property with Wells Fargo on December 28, 2004. The deed of trust securing that note was titled in both plaintiffs' names, and recorded and indexed in their names in the land records of this Court on or about January 12, 2005. After the December 28, 2004 refinancing, WFHM failed to fully and properly release the lien of its original deed of trust and of the May 1993 deed of assumption on the Longmont Road property as required by and in violation of Code of Virginia § 55-66.3. Plaintiffs again refinanced the note on their Longmont Road property with FMF Capital LLC on

October 21, 2005, which resulted in Wells Fargo's note being paid in full on or about November 1, 2005. Wells Fargo failed to fully and properly effect release of the lien of its December 28, 2004 deed of trust or the deed of assumption on the Longmont Road property as required by and in violation of Code of Virginia § 55-66.3 and the terms of the deed of trust; nor was a release of the lien properly index as required by Code of Virginia § 55-66.4:2. Consequently, pursuant to § 55-66.3 Wells Fargo and WFHM are each liable to the plaintiff for $500.00 each in damages for its own failure to fully and properly release both plaintiffs from the lien of its deed of trust and or the deed of assumption on the Longmont Road property.

3. On January 20, 2006, the plaintiffs refinanced the note on their Longmont Road property with Aegis Funding. Aegis Funding's affiliate and loan servicer Aegis Mortgage Corporation subsequently sold its (Aegis Funding) interest in the note to DLJ Mortgage Capital, Inc. on or about May 1, 2006 in a bulk sale of pooled mortgages. Ultimately, the note was transferred to and taken by Wells Fargo and US Bank as part of an investment trust. The January 20, 2006 deed of trust failed to comply with Code of Virginia 55-58.3(B)(1). As a result of this failure and the failures of Wells Fargo's and WFHM's to fully and properly release the lien of each of its deed of trust and the deed of assumption on the Longmont Road property, the January 20, 2006 deed of trust is void under Code of Virginia § 55-96 because Aegis Funding and its assignees and transferees either knew or should have known from the land records of this Court that

the lien of previous deeds of trust and deed of assumption had not been fully and properly released as required by Code of Virginia § 55-66.3. SIWPC had no authority as a substitute trustee under the void January 20, 2006 deed of trust.

4. DLJ Mortgage, US Bank, Wells Fargo, ASC, MERS, SIWPC and Hamlin combined and conspired in a scheme to conceal the fact that the January 20, 2006 deed of trust on the Longmont Road property was not a valid lien or security for the note in order to cloak the lack of trustee authority under the deed of trust. As part of that scheme, these defendants fraudulently represented in a Substitution of Trustee document recorded in the records of this Court and in a trustee's deed and other documents used in the foreclosure and eviction process that US Bank was the noteholder for the Longmont Road property with authority to enforce the note when they knew or should have known that the representation was false; these defendants used the false representations to forcibly change and take the title to the Longmont Road property from the plaintiffs.

5. On or about May 1, 2006, DLJ Mortgage purchased the January 20, 2006 note for the Longmont Road property from loan servicer Aegis Mortgage as part of a bulk secondary sale of pooled mortgages. In the January 20, 2006 deed of trust, Aegis Funding specifically named MERS as the beneficiary and nominee for the lender, its successors and assigns, vesting MERS with legal title. Naming MERS as the beneficiary and nominee under the deed of trust precluded Aegis Mortgage

from transferring or selling the deed of trust as security for the note. Only MERS had the authority to allow the deed of trust to be transferred or sold as a security interest for the note. Consequently, the deed of trust was fraudulently conveyed as security for the note and, therefore, DLJ Mortgage, US Bank, Wells Fargo and ASC had no security for the note Aegis Mortgage wrongfully sold to DLJ Mortgage, and had no equitable or legal interest in the deed of trust.

6. DLJ Mortgage, US Bank, Wells Fargo, ASC, MERS, SIWPC and Hamlin combined and conspired in a scheme to fraudulently use the January 20, 2006 deed of trust as security for the note, and conceal the fact that the January 20, 2006 deed of trust for the Longmont Road Property was not and could not be included with DLJ Mortgage's wrongful purchase of the January 20, 2006 note and that the note was purchased by DLJ Mortgage from Aegis Mortgage as an unsecured and wrongfully sold note. The lender for the note was Aegis Funding and by the terms of the note only the lender could transfer the note and upon the note's wrongful purchase by DLJ Mortgage from Aegis Mortgage the note was not properly transferred by the lender, Aegis Funding resulting in DLJ Mortgage not being a due course holder of the note.

7. US Bank, DLJ Mortgage, Wells Fargo and the trust in which the note was held were never the noteholder within the meaning of the terms of the January 20, 2006 note. US Bank, DLJ Mortgage, Wells Fargo and the trust in which the note was held were never the lender within the

meaning of the terms of the January 20, 2006 note. US Bank as a trustee for the trust that included the note could not have been a noteholder or due course holder of the note within the meaning of Virginia law. Thus, US Bank was without any authority to enforce the note rendering the February 6, 2008 foreclosure auction void.

8. US Bank was the designated trustee and custodian of the note and MERS was the nominee and beneficiary of the January 20, 2006 deed of trust, and both, in combination and conspiracy with ASC and Wells Fargo, were instrumental in causing the wrongful enforcement of the note and deed of trust and institution of foreclosure proceedings on the Longmont Road property, and in violating the express terms of the deed of trust.

9. The Longmont Road property's January 20, 2006 deed of trust was titled in the names of both plaintiffs and the note was only in Michael Scott's name.

10. ASC serviced the note under loan number 1205273029 on behalf of the trust in which the plaintiffs' note was held by Wells Fargo and US Bank.

11. On July 14, 2007, January 28, 2008 and February 4, 2008, the defendants wrongfully, intentionally and maliciously caused the plaintiffs names and Longmont Road property to be advertised in the *Virginian-Pilot* newspaper in connection with advertisement of their illegal, false and misleading

foreclosure sale of the Longmont Road property; the defendants malicious and outrageous actions in communicating the foreclosure with third parties and causing publication of the foreclosure auction and of the foreclosure insulted, defamed, slandered and libeled the plaintiffs in violation of Virginia law suggesting insolvency of the plaintiffs and used plaintiffs' names in the commercial advertisement without their consent and over their vehement objections made directly with SIWPC and Landmark in violation of Virginia law.

12. US Bank's, ASC's and Wells Fargo's illegal, void and voidable claimed foreclosure of the Longmont Road property in combination and conspiracy with Landmark, MERS and SIWPC breached and tortuously interfered with the original note and deed of trust.

13. US Bank, MERS, Wells Fargo, SIWPC and ASC combined and conspired to willfully and maliciously make a series of outrageous and harassing threats to foreclose on the Longmont Road property after receiving letters from the plaintiffs making inquiries about the note and disputing the debt owed.

14. An actual controversy exists between plaintiffs and defendants for voiding the foreclosure on the Longmont Road property on the aforementioned and the following non-exclusive grounds:

a) The plaintiffs notified SIWPC and ASC repeatedly that they disputed the amount

and validity of the debt on the Longmont Road property and neither defendant responded to the plaintiffs' dispute letters. SIWPC and US Bank failed to seek guidance from the state court to resolve the disputes over the debt raised by the plaintiffs;

b) The defendants caused a foreclosure auction to be held on February 6, 2008 to auction the Longmont Road property without any trustee authority or a valid deed of trust lien and in violation of Virginia law;

c) The defendants failed to properly accelerate the note's debt and failed to properly notify the plaintiffs in anyway whatsoever at the correct "notice" address the plaintiffs provided to ASC in direct violation of paragraph 15 of the deed of trust. The plaintiffs "notice" address was P. O. Box 6872, Virginia Beach, Virginia 23456 and was provided to ASC many months before the defendants initiated the foreclosure proceedings. The plaintiffs also notified SIWPC directly about the "notice" address;

d) MERS was designated the sole beneficiary and nominee for the lender and its assignees under the deed of trust vested with the only authority to appoint a substitute trustee and MERS did not appoint SIWPC as the substitute trustee resulting in SIWPC being without any authority under the deed of trust.

e) At the time of the auction on February 6, 2008, a white female ("auctioneer")

emerged from the office of SIWPC and announced that she was there to auction several properties in front of SIWPC's office door. In connection with her auctioning duties, she asked the attendees if she could forego reading all of the auctioneering instructions she was required to read. When none of the attendees responded to her, she stated that she would skip reading the instructions and did;

f) The substitute trustee, SIWPC, or its representative failed to attend any of the foreclosure auctions held outside its office on February 6, 2008 in violation of Virginia code and law. The auctioneer was the only person handling the entire auctioning process for several properties, including the Longmont Road property;

g) The Longmont Road property was the third of several properties auctioned. The auctioneer first announced that there were no written bids submitted for the Longmont Road property. She then stated in open outcry that she would start the bidding for the Longmont Road property at $260,000.00. There were no bidders on the property. She then announced that the property would "revert" back to the "noteholder," ASC, without specifying or announcing the amount ASC actually bid and after having stated that there were no written bids submitted;

h) ASC was not the noteholder and did not bid at the auction or submit any written bids on the Longmont Road property during the auction;

i) SIWPC and the other defendants conspired to fix the bid at the $260,000.00 opening and closing price for the Longmont Road property in a scheme for the benefit and unjust enrichment of US Bank, and to cause the closing bid to be outrageously low, well-below market value, and conscious shocking when similar type properties were listed and selling in the marketplace for $325,000.00 or more;

j) SIWPC conspired with US Bank, Wells Fargo and ASC in a fraudulent scheme to unjustly enrich US Bank by fabricating and fixing a written bid for US Bank in the amount of $260,000.00 to match the closing bid at the auction where no bids, written or announced in open outcry, and where there was no winning bidder or buyer announced;

k) As part of the defendants fraudulent scheme to cover up their inability to sell the plaintiffs Longmont Road property at the illegal foreclosure auction, the defendants fabricated accounting and other related post-auction documents to create the illusion that a sale of the Longmont Road property had occurred after having failed to secure any bidders during the auction, and to create the illusion that US Bank and or other bidders had submitted bids at the auction when they did not;

l) SIWPC in the foreclosure advertisement required a down payment of $20,000.00 or 10 percent before anyone would be allowed to bid on the Longmont Road property. The auctioneer requested the payment prior to

commencing the bidding and there were no prepaid payments made by any attendees or announced by the auctioneer in connection with the Longmont Road property;

m) The defendants caused fabricated and fraudulent documents to be created fraudulently conveying title for the Longmont Road property to SIWPC and US Bank when SIWPC and US Bank failed to attend, make the required down payment, submit a bid, or participate in anyway whatsoever in the auction; the fraudulent conveyance of the title unjustly enriched US Bank when it was not entitled to the title, and unjustly enriched SIWPC with the fees it collected for its trustee and legal counsel services that were charged to and defrauded from sale proceeds and from the plaintiffs; and

n) SIWPC failed to comply with the advertising requirements and failed to conduct the foreclosure sale within the time prescribed in relation to the first advertisement in violation of Virginia code and law and the terms of the deed of trust.

15. Hamlin, Wells Fargo, US Bank, MERS, ASC and SIWPC combined and conspired to use the Virginia Beach General District Court's ("general district court") legal processes to wrongfully and fraudulently claim legal title to the Longmont Road property and to evict the plaintiffs and unlawfully obtain possession of the property after having failed to sell the property at the foreclosure auction pursued based on a void deed of trust and authorized by non due course noteholders as asserted above,

and in so doing, inflicted economic duress on the plaintiffs, maliciously abused the legal process and maliciously prosecuted the general district court's legal process to achieve their vindictive, fraudulent and illegal means, including:

a) Hamlin, Wells Fargo, US Bank, MERS, ASC and SIWPC caused the issuance and service of a summons for unlawful detainer on the plaintiffs and after its issuance unlawfully used the general district court's legal processes to claim legal title to the Longmont Road property and to attempt to obtain possession of the property when they had no legal or equitable interest or right to the property.

b) The general district court did not have jurisdiction over the summons for unlawful detainer because the deed of trust was void under Virginia law and its enforcement was not authorized by the noteholder or due course noteholder, and because Hamlin, Wells Fargo, SIWPC, MERS, ASC and US Bank failed to properly invoke that court's jurisdiction and failed to comply with the deed of trust and such failure and lack of noteholder or due course noteholder authorization precluded trustee authority from being invoked.

c) Hamlin, Wells Fargo, US Bank, MERS, ASC and SIWPC combined and conspired to wrongfully, willfully and maliciously cause the summons for unlawful detainer to issue asserting that the Longmont Road property was sold at foreclosure, which did not and could not have happened since the deed of trust was void, the noteholder or due course noteholder failed to

authorize enforcement of the deed of trust, and MERS as beneficiary and nominee under the deed of trust was not involved in authorizing and appointing the substitute trustee; they failed to invoke the trustee authority under the deed of trust, and failed to invoke the general district court's jurisdiction.

16. The defendants conduct related to the Longmont Road property was fraudulent, illegal, outrageous, willful, intentional, negligent and malicious, designed to harass and inflict, and did harass and inflict, the plaintiffs with economic duress, severe emotional distress, which conduct humiliated and maligned the plaintiffs, their name and likeness and offended generally accepted standards of morality and decency.

17. The defendants fraudulently misrepresented in the summons that the Longmont Road property had been sold at foreclosure when they knew or should have known that there was no authority to foreclose; fraudulently misrepresented that the plaintiffs refused to vacate the Longmont Road property when they knew or should have known that the plaintiffs had uninterrupted legal and equitable title and ownership; fraudulently misrepresented in the land records of this Court that a substitution of trustee had occurred for the Longmont Road property when they knew or should have known that no authority existed for US Bank to substitute a trustee; fraudulently fabricated and concocted that a deed of foreclosure fraudulently conveying title of the Longmont Road property from the plaintiffs to SIWPC and US Bank when they knew or should have known that no foreclosure

occurred; and fraudulently fabricated and concocted accounting documents representing that the Longmont Road property had been sold to US Bank when they knew or should have known that no sale had or could have occurred, and that US Bank did not submit a written bid or pay the down payment required to bid at the auction. The defendants made these libelous, defaming, insulting, false and deceitful misrepresentations to the plaintiff and general district court and the clerk of that court in connection with their summons over which that court did not have jurisdiction causing that court and its clerk to rely on the false and deceitful representations to the detriment of the plaintiffs. This conduct constitutes actual and or constructive fraud, deceit and misrepresentation.

Plaintiff Terry A. Scott, proceeding *pro se,* alleges and states:

18. An actual controversy based on slander of title, unlawful detainer (Code of Virginia § 8.01-124 *et seq.),* fraudulent conveyance (Code of Virginia § 55-80), ejectment (Code of Virginia § 8.01-131 *et seq.),* failure to release deed of trust lien (Code of Virginia § 55-66.3), violation of Virginia statutes (Code of Virginia § 8.01-221), breach of and tortuous interference with contract, voidance of deed of trust lien (Code of Virginia § 55-96), removal of cloud on title (Code of Virginia § 55-153), and voidance of foreclosure exists between plaintiff Terry A. Scott and defendants WFHM[1], Barcliff, MERS, Prime

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[1] Plaintiff uses the name WFHM rather than ASC in connection with the Zephyr property because on information

Equity, Landmark, GE Mortgage and SIWPC based on a July 22, 2003 foreclosure of the Zephyr property and subsequent wrongful conveyance of plaintiffs' title for the following reasons:

a) GE Mortgage was the holder of the original note for the Zephyr property through an assignment. The plaintiffs assumed the original note for the Zephyr property from Mark and Cynthia Hanna (the "Hannas") on or about May 30, 1990. In connection with that assumption, the plaintiffs executed a deed conveying the Zephyr property from the Hannas to the plaintiffs as well as a $50.00 non-pre-payable five-year note to the Hannas secured by a deed of trust. The May 30, 1990 deed and deed of trust were recorded in the land records of this Court. WFHM serviced the original Zephyr property note on behalf of GE Mortgage. SIWPC was the substitute trustee that foreclosed the Zephyr property and in combination and conspiracy with WFHM and GE Mortgage caused forcible entry and taking of the property from the plaintiffs and the eviction of the plaintiff's rental tenant from the property and interference with the rental contract;

b) In November 1993, the plaintiffs refinanced the original note on the Zephyr property with GE Mortgage and executed a deed of trust to secure the new note on behalf of GE Mortgage. GE Mortgage failed to comply with Code of Virginia § 55-58.3(B)(1) resulting in the Hannas unreleased deed and deed of trust liens being superior to its note

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and belief, WFHM was not doing business as ASC during the time related to the Zephyr property. ASC is a fictitious name.

and deed of trust under Virginia law. WFHM serviced the November 1993 note for GE Mortgage;

c) The plaintiff disputed the amount and validity of the debt stated by WFHM, GE Mortgage and SIWPC prior to the July 22, 2003 foreclosure of the Zephyr property. SIWPC failed to seek the aid of the state court to resolve the dispute. The deed of trust was void under Virginia law (Code of Virginia § 55-96) because there was an unreleased deed of trust and deed liens on the Zephyr property when GE Mortgage refinanced the original note that GE Mortgage knew or should have known about. The deed and deed of trust plaintiffs executed in May 1990 with the Hannas remains in force to date in the chain of title for the Zephyr property in the land records of this Court as unreleased liens, providing actual and constructive notice to the public. GE Mortgage never properly released the original deed of trust lien in the Hannas or the plaintiffs' names since they had assumed the original note from the Hannas, and the Hannas never released the lien of the deed and deed of trust securing their $50.00 note under Virginia law;

d) SIWPC, as the substitute trustee under the November 1993 deed of trust, was without authority to foreclose on the Zephyr property since that deed of trust was not a lien on the Zephyr property because it was void as a lien due to the unreleased original deed of trust lien and the unreleased Hannas deed and deed of trust lien. Consequently, SIWPC, WFHM and GE Mortgage's forced entry and taking of the Zephyr property from the plaintiffs and forcibly and fraudulently

conveying legal title breached and interfered with the plaintiffs contractual ownership and rental contract;

e) The note for the Zephyr property stated that the property was located in Chesapeake, Virginia when the property was located in Virginia Beach. SIWPC failed to seek the aid of the state court to reform the note's fatal property location error. Consequently, the deed of trust was not a lien on the plaintiff's Virginia Beach property and the deed of trust could not have secured the note or provided any authority for the substitute trustee to foreclose the property;

f) SIWPC, WFHM and GE Mortgage failed to properly accelerate the note's debt and failed to properly notify the plaintiffs in anyway whatsoever at the correct "notice" address the plaintiffs provided to WFHM in direct violation of paragraph 13 of the deed of trust. The plaintiffs "notice" address was P. O. Box 6872, Virginia Beach, Virginia 23456 and was provided to WFHM (as servicer for GE Mortgage) many months before the defendants initiated the foreclosure proceedings;

g) SIWPC, WFHM and GE Mortgage failed to notify the Hannas about foreclosure of the Zephyr property pursuant to Code of Virginia § 55-59.1(A) since the Hannas had a valid, unreleased deed and deed of trust lien on the Zephyr property and, consequently, failed to meet the statutory prerequisites for acceleration of the note's debt;

h) SIWPC, GE Mortgage, WFHM and Landmark combined and conspired to cause foreclosure of the Zephyr property to be advertised in the *Virginian-Pilot* newspaper for the specific purpose of selling the property and forcibly taking the property from the plaintiffs. SIWPC failed to conduct the foreclosure within the time after beginning and completion of the advertisement as prescribed by Virginia law, but instead conducted the foreclosure sale over two months after the initial advertisement, and failed to advertise the cancellation or postponement of the original foreclosure sale, both in violation of the terms of the deed of trust and Virginia law;

i) SIWPC's employee Carolyn B. Leen ("Leen") conducted the foreclosure auction as auctioneer and the trustee or representative of the trustee failed to attend the foreclosure sale in violation of Virginia law;

j) There were no bids made on the Zephyr property by any of the attendees and Leen announced publicly that GE Mortgage's written bid of $65,000.00 she made in open outcry would be the winning bid. In the final statement of accounting, SIWPC represented that the sale price was only $56,056.00, thus depriving the plaintiff of $8,944.00. SIWPC fraudulently misrepresented the actual price of the winning bid in its final statement of account for the foreclosure sale to unjustly enrich GE Mortgage;

k) SIWPC conspired with WFHM and GE Mortgage in a fraudulent scheme to

fabricate and fix GE Mortgage's written bid by allowing Leen to first bid $65,000.00 in open outcry and then fixing the final statement of account price at $56,056.00 rather than $65,000.00 in violation of Virginia law;

l) GE Mortgage failed to accelerate the note's debt in accordance the language of the deed of trust and the note indicating that the property was located in Chesapeake, Virginia could not and was not secured by the plaintiff's property located in Virginia Beach, Virginia;

m) SIWPC failed to collect the $2,500.00 deposit in the form of cash or certified check from GE Mortgage as a precondition to Leen bidding on the Zephyr property on behalf of GE Mortgage as specified in the notice of sale and advertisements;

n) GE Mortgage, SIWPC and WFHM caused GE Mortgage's forced entry and exercise of ownership over the Zephyr property as a result of the void and illegal foreclosure depriving the plaintiff of the present value of the property and rental income of at least $535.00 per month since July 22, 2003 to the present date;

o) GE Mortgage and SIWPC willfully and intentionally slandered the plaintiffs' Zephyr property title in the land records of this Court by recording and indexing in those records an illegal and fabricated substitution of trustee and deed of foreclosure fraudulently conveying the property to the Secretary of United States

Department of Housing and Urban Development ("HUD");

p) Defendant Barcliff purchased the Zephyr property from HUD in June 2005 and Prime Equity financed Barcliff's purchase and secured its note with a deed of trust lien on the property in June 2005. MERS was subsequently assigned the note by Prime Equity. Barcliff, Prime Equity and MERS had actual and constructive knowledge of the unreleased original deed of trust lien and the unreleased Hannas deed and deed of trust lien since these documents were recorded in the land records of this Court. Plaintiff is entitled to have set aside the title to the Zephyr property fraudulently conveyed from plaintiffs to SIWPC, SIWPC to GE Mortgage, GE Mortgage to HUD, and HUD to Barcliff on the grounds that the July 2003 foreclosure was illegal and completely void and voidable, that the Zephyr property is being unlawfully withheld and its title was fraudulently conveyed from the plaintiffs, and that SIWPC, WFHM and GE Mortgage caused a breach of the plaintiff's deed of trust and rental contract with tenant by such foreclosure and subsequent transfers of title of the Zephyr property;

q) By advertising the Zephyr property in the *Virginian-Pilot* newspaper, foreclosing on the property, and evicting the plaintiff's tenant, Landmark, SIWPC, WFHM and GE Mortgage joined, combined and conspired to breach and tortuously interfere with the deed of trust and with the contract the plaintiff had with the tenant; and

r) Notwithstanding the wrongful and illegal foreclosure, GE Mortgage was fully paid its due by SIWPC, and in connection with the refinancing, and thereafter failed to fully and properly release the lien of its deeds of trust and the deed on the plaintiff's Zephyr property as required by and in violation of Code of Virginia § 55-66.3. Consequently, pursuant to § 55-66.3, GE Mortgage is liable to the plaintiffs for $500.00 in damages for each failure to fully and properly release both plaintiffs from the lien of its deed of trust and of the deed on the Zephyr property.

IV. Injunctive Relief

Plaintiffs incorporate by reference paragraphs 1 through 17 alleged above. Pursuant to Code of Virginia § 8.01-620 *et seq.,* plaintiffs request the Court to enjoin proceedings in the unlawful detainer action pending in the general district court, case number 08-016871, in which Wells Fargo, SIWPC, Hamlin and US Bank are unlawfully claiming title to the Longmont Road property as a result of the illegal foreclosure and on that basis attempting to evict the plaintiffs from the Longmont Road property. Plaintiffs request the Court to preliminarily enjoin defendants WFHM, Wells Fargo, SIWPC, US Bank and Hamlin from taking any actions whatsoever to obtain possession of the Longmont Road property until the Court rules on the merits of this litigation. Further, at the conclusion of this litigation, plaintiffs request the Court to permanently enjoin defendants WFHM, Wells Fargo, SIWPC, US Bank and Hamlin from taking any actions whatsoever to change the title from the

plaintiffs or to obtain possession of the Longmont Road property.

V. Jury Trial Demand

The plaintiffs demand a trial by jury.

VI. Prayer for Relief

WHEREFORE, plaintiffs, for their injuries and for the defendants' violations of state law and breaches of and interference with contracts, pray for the following relief, jointly and severally, against each of the defendants:

i. Entry of an order immediately enjoining Wells Fargo, SIWPC, US Bank, MERS and ASC from enforcing the January 20, 2006 note and deed of trust and from taking any action to foreclose or take possession of the Longmont Road property;

ii. Entry of an order canceling the January 20, 2006 note and deed of trust for the Longmont Road property under Virginia contract law;

iii. Entry of an order canceling the lien of the January 20, 2006 deed of trust for the Longmont Road property and requiring its recordation in the land records of this Court;

iv. Entry of an order of ejectment requiring Wells Fargo, SIWPC, US Bank, MERS and ASC to take steps to abrogate all actions taken to cause a change of title of the Longmont Road property;

v. Entry of an order awarding the plaintiffs any and all fees, charges, prejudgment and post-judgment interest, penalties, and any other amounts of money the plaintiffs paid to the defendants or was paid by the defendants on plaintiffs behalf to any third party in connection with and since the January 20, 2006 refinancing for the Longmont Road property;

vi. Entry of an order finding that Wells Fargo, ASC, MERS, US Bank and SIWPC breached and tortuously interfered with the note, deed of trust and its supporting contractual documents for the Longmont Road property by refusing to comply with the contractual terms, and for such breach and interference awarding the plaintiffs' damages as specified in the contractual documents;

vii. Entry of an order finding the February 6, 2008 illegal foreclosure auction of plaintiffs' Longmont Road property, change of title, and any accounting submitted to, accepted and or approved by the commissioner of accounts office to be voided;

viii. Entry of an order awarding the plaintiffs prejudgment interest from January 20, 2006 in connection with the Longmont Road property;

ix. Entry of an order awarding the plaintiff prejudgment interest from July 22, 2003 in connection with the Zephyr property;

x. Entry of an order finding the July 22, 2003 foreclosure sale and any related accounting

accepted by the commissioner of accounts office for the Zephyr property void and awarding the plaintiffs restoration of title, restitution for loss of use, property appreciation and ownership benefits, and interest thereon from July 22, 2003;

xi. Entry of an order finding that GE Mortgage, Landmark, WFHM and SIWPC breached and tortuously interfered with the plaintiff's rental contract and with the note, deed of trust and its supporting contractual documents for the Zephyr property by refusing to comply with the contractual terms, and for such breach and interference awarding the plaintiff damages as specified in the contractual documents and other resulting damages;

xii. Entry of an order restoring plaintiffs' title, and setting aside the Zephyr property transfers of title, deeds or deeds of trust: plaintiffs to SIWPC, SIWPC to GE Mortgage, GE Mortgage to HUD, and HUD to Barcliff, and any other title or ownership transfers;

xiii. Entry of an order awarding the plaintiffs all fees and costs, including expert witness and attorneys' fees where applicable, expended in this action;

xiv. Entry of an order awarding, where applicable, compensatory damages, and the maximum statutory punitive damages against the defendants; and

xv. Such other and further relief, statutory or common law, as the Court may deem just and proper.

Respectfully submitted,

/s/	/s/
Michael A. Scott	Terry A. Scott
Plaintiff, *pro se*	Plaintiff, *pro se*

4753 Longmont Road
Virginia Beach, Virginia
23456-5017
(757) 495-0844

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

MICHAEL A. SCOTT,

Plaintiff,

v. AT LAW NO. L99-351-01

NORFOLK SOUTHERN CORP., et al.,

Defendants.

ORDER

This matter came before the Court on Intervenors' Motion to Show Cause and for Sanctions ("Intervenors' Motion") to enforce certain prior orders of this Court enjoining Michael Scott ("Scott") from filing any further actions in any court in this Commonwealth without prior leave of this Court, including orders dated July 2, 2001, and January 31, 2008. This Court held hearings on Intervenors' Motion on July 14, 2008, August 20, 2008, September 22, 2008, and October 28, 2008.

During the August 20, 2008 hearing, this Court heard evidence, including *ore tenus* testimony. During the August 20, 2008 hearing, the Court also advised Michael Scott of his right to an attorney and asked Mr. Scott whether he wanted an attorney appointed for him or whether he wanted to retain counsel. Mr. Scott declined and executed a waiver of

counsel form, which is in the record of this case. At the conclusion of the August 20, 2008 hearing, the Court instructed the parties to file proposed findings of fact and conclusions of law, which the parties did, and instructed the parties to appear on September 22, 2008, for a ruling on the Intervenors' Motion.

Thereafter, at the hearing on September 22, 2008, the Court instructed the parties that it would hear any further evidence on October 28, 2008. In the interim, Scott filed a renewed Motion to Dismiss or, in the Alternative, to Stay, Motion for Interlocutory Appeal, and Motion for Bill of Particulars in this Court.

The parties then appeared before the Court on October 28, 2008, at which time the Intervenors and Mr. Scott both relied on the evidence and argument submitted at the August 20, 2008 hearing and subsequent proposed findings of fact and conclusions of law. As of October 28, 2008, Mr. Scott had taken no action to dismiss the case pending against the Intervenors in the Circuit Court of the City of Virginia Beach and had continued to pursue other legal claims via his defenses to the unlawful detainer action pending in the General District Court of the City of Virginia Beach and his motion for sanctions against certain of the Intervenors for allegedly failing to respond to a subpoena duces tecum.

During the October 28, 2008 hearing, the Court also noted that it had consulted with the Attorney General's office prior to the hearing, and as of the time of the October 28 hearing there had been no action by the Court of Appeals on Scott's

Emergency Motion to Stay Proceedings in Lower Court and Petition for Issuance of a Writ of Prohibition and for Issuance of a Writ of Mandamus.

In consideration of the pleadings, proposed findings of fact and conclusions of law, evidence, arguments of counsel and for good cause shown, it is hereby ADJUDGED, ORDERED and DECREED

1. Scott's Motions to Dismiss, for Stay of Trial, for Interlocutory Appeal, and Bill of Particulars are hereby DENIED;

2. Intervenors' Motion to Show Cause and for Sanctions is hereby GRANTED;

3. It appearing from the evidence offered in this matter that Scott is in civil contempt of the Court's order of July 2001 enjoining him from filing lawsuits without leave of Court and abused the permission granted by this Court to defend against the foreclosure in Virginia Beach. It is therefore ORDERED that within five (5) days of the date of entry of this Order Scott shall dismiss all matters filed by him pending in the Circuit Court of the City of Virginia Beach and shall withdraw all requests for any type of affirmative relief that may have been filed by him in any pending case, including before a Commissioner of Accounts regarding the foreclosure accounting and in the unlawful detainer action pending in the General District Court for the City of Virginia Beach;

4. It is further ORDERED that any permission given Scott by this Court to defend

against the foreclosure in Virginia Beach, including any permission given pursuant to this Court's order of January 31, 2008, is withdrawn due to his abuse of the process of the Court and harassment of other persons;

5. It is further ORDERED that pursuant to Virginia Code § 8.01-271.1, Scott shall pay to petitioners, through their attorney, the sum of $40,330.59 as attorney's fees and costs incurred herein;

6. It is further ORDERED that the parties shall appear before this Court on Wednesday, November 5, 2008, at 2:00 p.m., to determine whether the Court's rulings contained herein have been met under penalty of criminal sanctions.

ENTER: 10/28/08

/s/
Charles E. Poston, Judge

I ASK FOR THIS:

/s/
Stanley G. Barr, Jr.
R. Johan Conrod, Jr.
Counsel for Petitioners

SEEN AND OBJECTED TO:

/s/

Michael A. Scott,
Pro se plaintiff

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

MICHAEL A. SCOTT,

Plaintiff,

v. AT LAW NO. L99-351-01

NORFOLK SOUTHERN CORP., et al.,

Defendants.

ORDER

THIS DAY came Petitioner, Samuel I. White, P.C., Wells Fargo Bank, NA, DLJ Mortgage Capital, Inc., Wells Fargo Home Mortgage, Inc., d/b/a America's Servicing Company, US Bank, NA, GE Mortgage Services, LLC, and Jason Hamlin ("Petitioners"), by counsel, requesting leave to intervene in this matter and seeking injunctive and other relief against Michael A. Scott ("Scott"), and represent to the Court that Scott has filed a lawsuit against Petitioners and others seeking to set aside a foreclosure of his residence at 4753 Longmont Road, Virginia Beach, Virginia (the "Longmont Property"), and other relief, without first obtaining permission from this Court to do so.

It appears to the Court that by Order dated July 2, 2001, this Court found that Scott had a history of filing frivolous and vexatious lawsuits and

enjoined him from filing any other lawsuits in the Commonwealth of Virginia without first obtaining leave of court.

It further appears that Scott filed a lawsuit in the United States District Court in Norfolk on November 8, 2003, against Petitioners and others, seeking relief from threatened foreclosures on the Longmont Property and another piece of real estate owned by Scott and his wife, Terry, at 602 Zephyr Court, Virginia Beach, Virginia (the "Zephyr Property"), which lawsuit was dismissed and with a prefiling injunction entered in that Court as well.

It further appears that on January 31, 2008, this Court entered an Order granting Scott leave to file a lawsuit in the Circuit Court of the City of Virginia Beach to enjoin foreclosure of the Longmont Property, which lawsuit was filed on February 8, 2008 (the "First Virginia Beach Action") against Petitioners and others, which action was removed to the United States District Court in Norfolk where it was dismissed on March 14, 2008, for failure to seek leave from the United States District Court before filing the action.

It now appears that Scott has filed yet another lawsuit in the Circuit Court of the City of Virginia Beach on June 9, 2008, CL08-003200-00 (the "Second Virginia Beach Action") against Petitioners and others, seeking to set aside the foreclosure of the Longmont road property of February 6, 2008, and the Zephyr Property foreclosure, and other relief.

The Court finds that Scott did not seek leave from this Court before filing the Second Virginia Beach Action. The Court also finds that Scott has filed a series of law suits against Petitioners, and others, which have been dismissed. The Court further finds that inasmuch as Scott sought leave of court to sue Petitioners, it is appropriate that Petitioners be permitted to intervene in this case.

Therefore, it is ORDERED that Petitioners be and they are hereby permitted to intervene in this case; ~~it is further ORDERED that all proceedings in the Second Virginia Beach Action be and~~ (init. CEP) ~~they are hereby STAYED;~~ and it is further ORDERED that Michael Scott appear in this Court on August 6, 2008, to show cause, if any he can, why he should not be found in contempt of this Court's Order.

ENTER: 8/7/08

/s/
Charles E. Poston, Judge

I ASK FOR THIS:

/s/
Stanley G. Barr, Jr.
R. Johan Conrod, Jr.
Counsel for Petitioners

SEEN AND OBJECTED TO:

/s/
Michael A. Scott,
Pro se plaintiff

(2)

No. 09-1008

Supreme Court, U.S.
FILED
MAR 29 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL SCOTT, ET UX.,

Petitioners,

v.

SAMUEL I. WHITE, P.C., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION STATEMENT

Petitioners seek certiorari of state court decisions they allege violated their due process and equal protection rights under the Fourteenth Amendment and rights to petition courts under the First Amendment. In the Statement of the Case Petitioners assert that they raised the Constitutional issues in the trial court in response to objection to Michael Scott's nonsuit motion (Pet. 11) and again in their petition for appeal to the Supreme Court of Virginia (Pet. 12). However Rule 14.1(g)(i), Rules of the Supreme Court of the United States, requires that when review of a state court judgment is sought and federal questions are raised, the Statement of the Case must contain quotations from specific portions in the record where the matter appears. No such quotations from the record appear in the Statement of the Case. Further, Rule 14.1(i)(v) requires that an appendix include the material required in Rule 14.1(g)(i). No such material is included in the Appendix. With the failure to include in the Appendix any portion of the record of the trial court or their Petition for Appeal to the Virginia Supreme Court, where the constitutional issues now asserted where allegedly raised, the Court cannot determine whether or not Constitutional issues are being raised for the first time in this Court. The Court must therefore decline to exercise jurisdiction. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (Court has no jurisdiction unless a federal question was raised and decided in the state court below.) See also Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 4022, at 322-23 (2d ed. 1996).

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari by career *pro se* litigant, Michael Scott ("Scott"), and his wife, Terry ("Terry Scott"), (collectively the "Scotts") seeking reversal of an Order of the Circuit Court of the City of Virginia Beach (the "trial court") entered on February 25, 2009, dismissing the instant case, the second of two cases they filed seeking to set aside foreclosures ("Virginia Beach II"). Scott was under a pre-filing injunction order entered by the Circuit Court of the City of Norfolk (the "Norfolk Court") on July 2, 2001 (the "2001 Order"). (App. 6.) The Scotts filed Virginia Beach II on June 9, 2008, but Scott failed to petition the Norfolk Court for leave to file the case. Respondents filed a Motion to Intervene and Show Cause in the Norfolk Court seeking a contempt citation with sanctions, including an order that Virginia Beach II be dismissed for violating the 2001 Order. (App. 44.) The Norfolk Court found Scott in civil contempt and on October 28, 2008, ordered that he dismiss Virginia Beach II (the "October Order"). (App. 39.) Rather than comply with the October Order, Scott sought to take a nonsuit of his involvement in Virginia Beach II while leaving his wife as a party to proceed. Respondents objected to the nonsuit and sought dismissal of Virginia Beach II as per the October Order. The Virginia Beach Court granted respondents' motion and dismissed the case with prejudice. (App. 3.) The Scotts' Petition for Appeal to the Supreme Court of Virginia was refused as was their motion for re-hearing. (App. 1.)

The facts relevant to the Petition relate more to the procedural history of Scott seeking to overturn the 2001 Order than to the trial court's decision to

dismiss this lawsuit. Scott has a long and unsuccessful history of filing frivolous lawsuits in the local state and federal courts. Unfortunately, only a small portion of that history is in the Appendix.

The 2001 Order is a point of beginning. Scott filed several lawsuits against Norfolk Southern Corporation, the last of which was filed in the Norfolk Court in 1999 (the "Norfolk Southern Case"), naming as defendants the corporation's officers, directors, certain employees and several outside lawyers (collectively, the "Norfolk Southern Defendants"). Because Scott raised federal issues in the case, the case was removed to the United States District Court for the Eastern District of Virginia ("District Court"). An answer was not filed in the Norfolk Court. The case was dismissed in the District Court, after which Scott filed a motion for default judgment ("Default Motion") in the Norfolk Court. In his Default Motion, Scott alleged the Norfolk Court retained jurisdiction over the case despite its removal to District Court because of defective service of the removal notice. The Norfolk Court found that the Default Motion was nothing more than a part of Scott's continuous pattern of filing vexatious and frivolous lawsuits against Norfolk Southern and, as such, entered the 2001 Order. Scott sought an appeal of the 2001 Order to the Supreme Court of Virginia which denied review (the "2001 Appeal"). Scott also filed a Petition for a Writ of Mandamus in that court ("2001 Petition"), seeking a ruling on the Default Motion. The court denied the 2001 Petition.

In recognition of his obligation under the 2001 Order to seek leave of court before filing lawsuits, Scott submitted himself to the jurisdiction of the Norfolk Court and sought leave to file lawsuits on July 24, 2003, and again on January 31, 2008. On January 31, 2008, the Norfolk Court granted Scott leave to file a lawsuit in Virginia Beach to protect property he owned in Virginia Beach from a foreclosure sale scheduled for February 6, 2008. Scott, however, did not file the lawsuit before the foreclosure sale occurred. Instead, the Scotts sued seeking money damages against some of the respondents for wrongful foreclosure ("Virginia Beach I"). Because the Scotts raised federal claims in Virginia Beach I, it was removed to the U.S. District Court where it was subsequently dismissed for violating the terms of that court's pre-filing injunction entered in 2005 against both of them.

After dismissal of Virginia Beach I, and without seeking further leave from the Norfolk Court, the Scotts filed Virginia Beach II seeking essentially the same relief and named additional defendants. Rather than respond to the allegations contained in Virginia Beach II, some respondents filed a Motion to Intervene in the Norfolk Southern Case, and a Show Cause Motion, seeking a contempt order against Scott for violation of the 2001 Order for filing Virginia Beach II without leave of court. The Norfolk Court granted the Motion to Intervene, (App. 44, in response to which Scott filed a Petition for Writ of Prohibition and Writ of Mandamus ("Petition I") in the Supreme Court of Virginia in which he again attacked the 2001 Order and the Norfolk Court's jurisdiction to grant the Motion to Intervene. The court dismissed Petition I on November 25, 2008.

On August 20, 2008, the Norfolk Court conducted a trial on the Show Cause Motion, during which Scott presented evidence in support of Virginia Beach II. During the trial the Norfolk Court indicated that Scott could be guilty of criminal contempt. Scott then filed a Motion to Stay and a second Petition for Writ of Prohibition and Writ of Mandamus (collectively, "Petition II"), this time in the Virginia Court of Appeals. Petition II was denied on November 6, 2008.

On October 28, 2008, the Norfolk Court entered the October Order for violating the 2001 Order and imposed sanctions, including ordering Scott to dismiss Virginia Beach II. However, Scott filed a motion of nonsuit of his involvement in the case, to which respondents objected and moved for dismissal per the October Order. The parties submitted briefs, and after oral argument on January 23, 2009, the trial court sustained respondents' objection, denied the motion of nonsuit, and dismissed Virginia Beach II.

ARGUMENT SUMMARY

Petitioners seek reversal of the dismissal of a lawsuit they had no right to file in the first instance. Michael Scott is subject to a prefiling injunction from the Circuit Court of Norfolk entered in 2001 which the Virginia Supreme Court declined to review. His challenge to the 2001 Order comes too late.

The 2001 Order is not a prior restraint on court access. Scott failed to obtain permission to file the instant case, subjecting the case to dismissal and Michael Scott to contempt. As a sanction the Norfolk

Court found Scott in civil, not criminal, contempt and ordered that he dismiss the lawsuit.

Contrary to the intent of the sanctions order that the lawsuit be dismissed with prejudice, Scott sought a dismissal without prejudice by seeking an order of nonsuit. His attempt at a nonsuit was denied and the case was dismissed with prejudice after notice and an opportunity to be heard. Scott had no property interest in his right to a nonsuit.

Terry Scott was not a necessary party to the October Order as the Order related to the lawsuit, not to her, and she had no property right in a lawsuit that was a nullity.

ARGUMENT

1. Michael Scott's challenge to the 2001 Order in this Court is time barred.

a. Scott has Waived his Right to Claim that the Injunction Order is Void.

Scott has made a career of filing meritless lawsuits against those whom he believes have done him an injustice. This Petition is no exception. At the heart of this Petition is the 2001 Order. As demonstrated by the factual background set forth above, Scott has sought to overturn the 2001 Order on at least four other occasions, all of which were unsuccessful.

The Norfolk Court never lost personal jurisdiction over Scott to permit or deny his right to file lawsuits anywhere in Virginia, authority confirmed by the Virginia Supreme Court's denial of

the 2001 Petition for Appeal and the denial of Petition I. He had 90 days within which to seek review in this Court. He never did so.

Moreover, Scott later twice availed himself of the Norfolk Court's jurisdiction after entry of the 2001 Order, demonstrating Scott's tacit -- if not explicit -- acknowledgment of the Norfolk Court's appropriate exercise of personal jurisdiction.

b. **Scott's Challenge to the 2001 Order is Barred by *Res Judicata*.**

Principles of *res judicata* prevent the Scotts from resurrecting claims on which the Virginia Supreme Court issued a decision on the merits. In Virginia, the refusal of a petition for appeal constitutes a decision on the merits. *Sheets v. Castle*, 263 Va. 407, 411, 559 S.E.2d 616, 619 (2002); *Saunders v. Reynolds*, 214 Va. 697, 700, 204 S.E.2d 421, 424 (1974) ("[w]e state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion — the merits of the case"); *see also Wright v. West*, 505 U.S. 277, 283 (1992) ("the Supreme Court of Virginia refused the petition — a disposition indicating that the [C]ourt found the petition without merit"); *Jackson v. Virginia*, 443 U.S. 307, 311 n.4 (1979) ("[e]ach petition for writ of error under Va. Code § 19.2-317 (1975) is reviewed on the merits . . . and the effect of a denial is to affirm the judgment of conviction on the merits"); *Dodson v. Director of Dep't of Corrections*, 233 Va. 303, 307 n.5, 355 S.E.2d 573, 576 n.5 (1987) ("[i]n Virginia, aside from appeals from a capital murder conviction, criminal appeals to both the Court of Appeals and to this

Court are discretionary, and 'a decision to grant or refuse a petition [for appeal] is based upon one equally-applied criterion — the merits of the case.'" (citation omitted)). Scott's 2001 Appeal sought reversal of the 2001 Order. The denial of that appeal was a decision on the merits.

Likewise, when Scott filed Petition I to the Virginia Supreme Court, he again challenged the Norfolk Court's jurisdiction to re-open the Norfolk Southern Case for purposes of the Motion to Intervene and Show Cause for violating the 2001 Order. He argued that the 2001 Order applied only to the Norfolk Southern Defendants, and respondents had no standing to intervene. Exercising jurisdiction is a discretionary act by a trial court and will not be reviewed on a writ of mandamus, absent an abuse of discretion. *See In re Commonwealth's Attorney*, 265 Va. 313, 576 S.E.2d 458 (2003) (dismissing writ of mandamus because mandamus does not lie to review discretionary, judicial acts of the court, e.g., rendering certain judgments).

Although respondents were not parties in the Norfolk Southern Case, as intervenors they were privies of the Norfolk Southern Defendants, in that they shared an identity of legal interest; i.e., both parties sought to prevent Scott from filing additional lawsuits absent the Norfolk Court's approval. *See Leeman v. Troutman Builds, Inc.*, 260 Va. 202, 206, 530 S.E.2d 909, 911 (2000) ("[A] party to the present suit, to be barred by [*res judicata*], must have been a party to the prior litigation, or represented by another so identified in interest with him that he represents the same legal right.") (emphasis added).

The refusal to grant a writ because the trial court exercised its discretion has precedential value. Under principles of *res judicata*, the denial of Petition I barred Scott from challenging the Norfolk Court's jurisdiction to enter the 2001 Order or the order allowing respondents to intervene. *See Bates v. Devers*, 214 Va. 667, 672 n.8, 202 S.E.2d 917, 922 n.8 (1974) (defining a cause of action, under principles of *res judicata* as an "assertion of particular legal rights which have arisen out of a definable factual transaction."); *See also Scales v. Lewis*, 261 Va. 379, 382, 541 S.E.2d 899, 901 (2001) ("The doctrine of *res judicata* precludes parties from relitigating the same cause of action when a valid, final judgment was previously entered.").

2. **The Scotts had all the due process to which they were entitled.**

In Questions Presented 1, 2, 4 and 5 petitioners complain that the trial court violated their Fourteenth Amendment due process and equal protection rights when it dismissed their case without notice (Question 1), in reliance on the October Order which allegedly found Scott in criminal contempt (Question 2), and applied the October Order to Terry Scott when she was not a party to the Show Cause Motion (Question 4). In Question 5 petitioners say the trial court lacked jurisdiction to dismiss the case when not all the defendants were before the court. Wading through the excess verbage it can be concluded that petitioners are making procedural due process claims because the trial court did not give notice that it might dismiss the case and Terry Scott was not a party to the October Order.

However, it is not just the October Order on which the trial court relied in dismissing this case, rather it was the 2001 Order that the trial court found the petitioners violated.

Looked at in its entirety, this Petition is all about the 2001 Order. When the Norfolk Court entered that order it intended that no lawsuit to which Scott was a party could be filed without that court's consent. The Scotts knew that when Scott sought and obtained permission to file Virginia Beach I to which Terry Scott was a party plaintiff. Knowing he would likely not be granted permission to file Virginia Beach II Scott devised a scheme to hold Terry Scott out as a lone plaintiff, attacking the 2003 foreclosure of their Zypher property. The transparency of that effort is revealed by the fact that the Zypher property was owned jointly and Scott would have benefited from a lawsuit the court would not likely have granted him leave to bring. Therefore, it can only be the 2001 Order, and not the October Order, that the trial court found Scott violated and applicable to Virginia Beach II.

a. **The Scotts received notice.**

In Question 1 the Scotts complain that the trial court did not give them notice that it might dismiss the case nor did it give them opportunity to be heard. (Pet. 19.) Both statements are incorrect but the absence of an adequate appendix cannot show that. However, they acknowledge that the petitioners (sic) filed an objection to Scott's motion for nonsuit and sought dismissal of the entire case (Pet. at 11,19.). The dismissal order also recites the fact of notice and argument from the Scotts. (App. 3.)

b. The October Order did not impose criminal sanctions.

Although Question 2 asserts that the October Order imposed criminal sanctions the argument in support relates only to the 2001 order as imposing criminal sanctions. (Pet. 16.)

Scott contends that the 2001 Order was a finding of criminal contempt and, because the October Order imposed sanctions for its violation, the October Order was also a finding of criminal contempt and a violation of his due process rights. (Pet. 19.) Like Petition I, the denial of Petition II also has precedential value. In Petition II, Scott sought a writ of prohibition and writ of mandamus in the Virginia Court of Appeals, claiming the 2001 Order is a criminal sanction, and that respondents' Show Cause Motion was a criminal prosecution. Petition II was refused. Scott sought review in the Virginia Supreme Court. That too was refused. Those arguments are now repeated in this Petition and the denial of Petition II precludes Scott from re-litigating those issues now. (Pet. 24.) *See Bates*, 214 Va. at 672, 202 S.E.2d at 922; *see also Scales*, 261 Va. at 382, 541 S.E.2d at 901.

It is also important to note that while Scott contends that the Norfolk Court found him in criminal contempt when it entered the October Order, the Order is clear that the court found him in civil contempt. (App. 41.)

c. **The October Order applied to Virginia Beach II, not Terry Scott individually.**

Scott has all but conceded that Virginia Beach II could not have been brought without permission from the Norfolk Court and dismissal of the Longmont Road claim was appropriate. (Pet. 31.) However, the Scotts insist that Terry Scott was acting alone in that portion of the Complaint which related to the 2003 foreclosure of the Zypher property. (App. 27-34.) Again, without an adequate Appendix the court cannot know the tortured path the Zypher property litigation followed in the U.S. District Court and the Fourth Circuit Court of Appeals. But the trial court had that history (App. 3.) as did the Norfolk Court when it entered the October Order. (App. 45.) It is significant to point out that in the litigation in the District Court both the Scotts were parties plaintiff and the court found the action so frivolous that it entered a pre-filing injunction as well.

It is not denied that Terry Scott knew of the 2001 Order. Forewarned, she joined in a lawsuit she knew was subject to dismissal. She filed her own pleading in opposition to the respondents objection to nonsuit and motion to dismiss. Had she filed her own motion for nonsuit the outcome might have been different, but she never presented that option to the trial court. Her claim of denial of both procedural and substantive due process is baseless.

3. The Scotts had no property interests of which they were deprived.

In Question Presented 3 Scott claims that he had a Fourteenth Amendment property interest in the October Order and the trial court's refusal to grant his motion for nonsuit deprived him of that property right. In Question Presented 6 the Scotts claim they had had a protected property interest in the statutory default against certain respondents when they did not file a responsive pleading in the trial court but instead pursued contempt in the Norfolk Court against Michael Scott. As with the rest of the Scotts' claims, these too are without merit.

a. Scott had no vested right and property interest.

Scott argues that he had a "vested right and property interest" in his ability to comply with the October order and that he was deprived of this right when the lower court refused to grant him a nonsuit. (Pet. 25.) Scott also contends that he had a "constitutionally protected property interest" in his right to a nonsuit.

Pursuant to the Fourteenth Amendment, states and their instrumentalities may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. As this Court has observed, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms." *Bd. of*

Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972). Significantly, in order to state a claim under the Fourteenth Amendment, a party must allege a cognizable property interest. *Id.* at 571. "Property interests, of course, are not created by the Constitution," but stem instead "from an independent source such as state law." *Id.* at 577. In order to possess a protected property interest, one "must have more than an abstract need or desire for it . . . [or] a unilateral expectation of it," and "must, instead, have a legitimate claim of entitlement to it." *Id.*

Under Virginia law, Scott had no legitimate right to assert a property interest in the October Order or his right to take a nonsuit. There is no Virginia law that entitles Scott to the right to comply with the October order. Thus, without a legitimate claim of entitlement, he does not have a property interest protected by the Fourteenth Amendment.

Moreover, Scott did not have a property interest in his ability to take a nonsuit because pursuant to Virginia law, he did not have a legitimate claim of entitlement to a nonsuit under the circumstances of this case. Under Virginia Code § 8.01-380(B), a plaintiff may take one nonsuit as a matter of right; however, "only a validly pending proceeding can be nonsuited." *Johnston Mem' Hosp. v. Bazemore*, 277 Va. 308, 313, 672 S.E.2d 858, 861 (2009). "If an action is a nullity, regardless of the reason it is such, then no legal proceeding is pending that can be nonsuited." *Id.* at 314, 672 S.E.2d at 861.

In *Johnston Memorial Hospital*, the plaintiff filed a wrongful death action prior to qualifying as administratrix of her husband's estate. *Id.* at 310, 672 S.E.2d at 859. Because only the personal representative of a decedent's estate may institute a wrongful death action, the plaintiff did not have standing to bring the case. *Id.* at 312, 672 S.E.2d at 860. On appeal, the plaintiff argued that the lower court was proper in granting her a nonsuit because it was the only remedy available to her. *Id.* at 314, 672 S.E.2d at 861. The Virginia Supreme Court disagreed, stating that her action was without legal effect and therefore concluding that the lower court erred in granting the nonsuit. *Id.* at 312, 672 S.E.2d at 862.

Also, in *Kone v. Wilson*, 272 Va. 59, 630 S.E.2d 744 (2006), the Virginia Supreme Court held that the plaintiff's complaint was invalid and without legal effect because the plaintiff signed the pleading in a representative capacity and was not authorized to practice law. *Id.* at 62, 630 S.E.2d at 746. Consequently, the court affirmed the lower court's dismissal of the action with prejudice. *Id.* at 62-63, 630 S.E.2d at 745-46.

Similarly, in *Nerri v. Adu-Gyamfi*, 270 Va. 28, 613 S.E.2d 429 (2005), the court held that the pleading was invalid and, therefore, the plaintiff could not nonsuit the proceeding. At the time the attorney signed the complaint his license to practice law had been administratively suspended. *Id.* at 30, 613 S.E.2d at 430. The attorney was not authorized to practice law, and as a result, the pleading was invalid and had no legal effect. *Id.* at 31, 613 S.E.2d at 430. The court held that it was error for the lower

court to grant the nonsuit under such circumstances. *Id.*

The circumstances of this case are analogous to the above cases in which the Virginia Supreme Court held that the plaintiff was not entitled to a nonsuit. Scott initiated this action and signed the pleadings when he was barred from doing so by court order. This situation is no different than the attorney who signed the pleadings when he was not authorized to practice law or when a plaintiff signs a pleading in a representative capacity when he is not authorized to practice law. *See Kone*, 272 Va. at 62, 630 S.E.2d at 746; *Nerri*, 270 Va. at 30, 613 S.E.2d at 430. Under both of these circumstances, the Virginia Supreme Court declared the proceeding a nullity and without legal effect. *Kone*, 272 Va. at 63, 630 S.E.2d at 746; *Nerri*, 270 Va. at 31, 613 S.E.2d at 430. Thus, when Scott initiated the action in violation of the 2001 Order, the proceeding was also a nullity and without legal effect.

b. **The Respondents were not in default.**

The Scotts also argue that they had a protected property interest in respondents' alleged statutory default and that they were deprived of this interest in violation of their rights under the Fourteenth Amendment. In order to state a claim under the Fourteenth Amendment, the Plaintiff must allege a cognizable property interest. *Roth*, 407 U.S. at 571.

The Scotts say that respondents made a general appearance in the trial court when they opposed the Scotts' July 8, 2008, Motion for

Temporary Injunction and then did not file responsive pleadings in that Court. (Pet. 34.)

When the U.S. District Court dismissed Virginia Beach I, the Scotts filed a Motion for Reconsideration but, rather than pursuing that motion, they filed Virginia Beach II and sought service by mail. Only MERS accepted service. In the interim, after the foreclosure, respondent US Bank, NA, the holder of the defaulted note, filed an unlawful detainer action in the Virginia Beach General District Court. Rather than litigating the unlawful detainer action there, Scotts filed the Motion for Temporary Injunction in the trial court, seeking to enjoin the action pending in General District Court. Instead of sending notice of the Motion for Injunction only to US Bank, the Scotts noticed all respondents. Counsel for US Bank and counsel for the other respondents appeared to object to jurisdiction when a representative of US Bank advised that it had taken a nonsuit of the unlawful detainer action, making the request for injunction moot. The motion was dismissed.

c. **No general appearance.**

Respondents did not make a general appearance on July 8, 2008, in response to the Scotts' motion to enjoin US Bank from pursuing its unlawful detainer action. Respondents appeared to object to the court's jurisdiction for several reasons. First, a circuit court could not hear a motion to enjoin an unlawful detainer action as general district courts have exclusive jurisdiction over such actions pursuant to Virginia Code § 16.1-77(3). If the Scotts were unsuccessful in their defense in that court, they

had an automatic right of appeal to the Circuit Court pursuant to Virginia Code § 16.1-106. This statutory procedure provided the Scotts an adequate remedy at law, obviating any need to invoke the Circuit Court's jurisdiction in equity for injunctive relief. Further, respondents were prepared to argue that because the matter was currently pending in the General District Court, the Circuit Court lacked jurisdiction under Virginia Code § 17.1-513. Circuit Courts "have original and general jurisdiction of all civil cases, ... except such cases as are assigned to some other tribunal...." Va. Code Ann. § 17.1-513. However, because US Bank had earlier taken a nonsuit of the pending unlawful detainer action, and for that reason the preliminary injunction was now moot, respondents never advanced their objection to the court's jurisdiction.

d. **Further responsive pleadings not required.**

By timely filing the Motion to Intervene in the Norfolk Court rather than responsive pleadings in the trial court, no further response was necessary once the Norfolk Court took jurisdiction. The obligation to file a response in the trial court was suspended until after a decision by the Norfolk Court.

> The main rule which preserves the two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of litigation under its control, whether this be person or property, must be permitted to exhaust its remedy, to

> attain which it assumed control, before the other court shall attempt to take it for its purpose. See *Covell v. Heyman*, 111 U.S. 176, 4 S. Ct. 355, 28 L. Ed. 390.

Wilkinson v. Youell, 180 Va. 321, 326, 23 S.E.2d 356, 358 (1942).

Principles of comity support the Court's action in deferring to the Norfolk Court which retained jurisdiction over the plaintiffs by virtue of the 2001 Order. *See Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 361, 542 S.E.2d 377, 383 (2001) (*citing Oehl v. Oehl*, 221 Va. 618, 623, 272 S.E.2d 441, 444 (1900), for the following guidance:

1. the foreign court had personal and subject matter jurisdiction to enforce its order within its own jurisdiction;

2. the procedural and substantive law applied by the foreign court was reasonably comparable to that of Virginia;

3. the foreign court's order was not falsely or fraudulently obtained;

4. the enforcement of the foreign court's order was not contrary to the public policy of Virginia, or prejudicial to the rights of Virginia or her citizens.

In Re Estate of Edwards, No. CL78932 2009 WL 3344854 (Prince William County Cir. Ct. Jan. 14, 2009).

Scott submitted himself to the jurisdiction of the Norfolk Court, at least as late as January 31, 2008, when he sought and obtained leave to file Virginia Beach I. That Court did not lose jurisdiction over him merely because he did not follow the same path before filing the instant case.

Furthermore, under Virginia Supreme Court Rule 3:8, a trial court has discretion to allow more time for the filing of responsive pleadings. If the court has discretion to act under the rule, then it necessarily follows that the Scotts could not have a legitimate claim of entitlement to application of this rule. *See Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993); *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63, 68-72 (4th Cir. 1992). The Scotts, at best, had nothing more than an abstract need, desire, or unilateral expectation that the court would hold the defendants in statutory default due to the fact that the pleadings were not filed within twenty-one days. This unilateral expectation is insufficient to state a property interest protected under the Fourteenth Amendment. *See Roth*, 407 U.S. at 577.

Moreover, as discussed above, the proceeding was a nullity and without legal effect; therefore, the court was not permitted to award the Scotts relief or hold the respondents in default. Accordingly, the Scotts did not have a legitimate claim of entitlement to the respondents' statutory default and therefore did not possess a property interest within the cognizance of the Fourteenth Amendment.

4. **The October Order is not Void for Want of Necessary Parties.**

Throughout the Petition, the Scotts argue that the October Order is void because, among other reasons, Terry Scott was a necessary party to the Show Cause Motion to which she was not joined. (Pet. 27.) However, Scott never raised this argument in the Norfolk Court or objected to the Show Cause proceeding going forward without adding her as a party. The argument comes too late in this Petition.

Scott contended in his Petition for Appeal in the Virginia Supreme Court that, in that portion of Virginia Beach II that refers to the Zephyr property, Terry Scott alone was the plaintiff, and, second, the Norfolk Court found her in violation of the 2001 Order by ordering that Scott dismiss Virginia Beach II. In contrast, in this Petition they say the trial court found Terry Scott in violation of the October Order. Regardless, by relating the Zephyr property claim only to Terry Scott, the Scotts are trying to create a separate cause of action for her in the Complaint. The claim overlooks the requirement that all counts in a complaint be separately set out. That is not apparent from reading the Complaint. The argument also overlooks the fact that before its foreclosure, the Zephyr property was owned by the Scotts jointly, and, consistent with their position that Terry Scott is a necessary party to the Show Cause Motion, then Michael Scott would be a necessary party for complete relief prayed for regarding the Zephyr property. The Scotts cannot have it both ways. Therefore, either Michael Scott is a necessary party to the Zephyr claim, in order for the trial court to grant the relief prayed for, or Terry

Scott was not a necessary party to the Show Cause Motion.

Any argument that the Norfolk Court found Terry Scott in violation of the 2001 Order would likewise be frivolous. Scott does not contest that he did not return to the Norfolk Court to seek relief to file Virginia Beach II. The effect of that failure meant that Virginia Beach II was an unauthorized law suit, subject to dismissal, without regard to the fact that Terry Scott was a party plaintiff or that it involved property in which she had an interest.

For good measure, the Scotts also argue that the October Order is void because other defendants were not included in the Motion to Intervene. (Pet. 32.) Landmark's Motion to Dismiss in Virginia Beach had been granted, so it was no longer a party. Neither Prime Equity nor Edward Barcliff had been served with the Complaint, so they were not in the case at that point. And MERS was inadvertently left out of the Motion to Intervene but was permitted by order to file a late response. In any event, it is safe to say that none of the absent defendants would object to the court's ruling. Here, the respondents were seeking to have the Norfolk Court enforce the 2001 Order against Scott, the party who was the subject of the Order. The relief sought was the dismissal of the lawsuit that could not have been filed unless he alone got permission to do so. None of the other parties to the case were necessary to be before the Court in order for it to grant complete relief. They were not "... materially interested either legally or beneficially in the subject matter or event of the suit...," i.e., the Motion to Intervene and Show

Cause. *Jett v. DeGaetani*, 259 Va. 616, 619, 528 S.E.2d 116, 118 (2000).

CONCLUSION

This meritless Petition for Writ of Certiorari was filed for no purpose other than to cause the Respondents to incur the cost necessary to respond to it. This is more of an abuse of civil process which should not go unpunished, especially when recognizing the prior decision of the Supreme Court of Virginia relating to the issues raised in this Petition. Respondents request that this Petition be denied and that Respondents be awarded such other relief as justice may require.

SAMUEL I. WHITE, P.C., WELLS FARGO BANK, NA, DLJ MORTGAGE CAPITAL, INC., WELLS FARGO HOME MORTGAGE, INC., d/b/a AMERICA'S SERVICING COMPANY, US BANK, NA, GE MORTGAGE SERVICES, LLC, and JASON HAMLIN

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Supreme Court, U.S.
APR 5 - 2010
OFFICE OF THE CLERK

No. 09-1008

In The
SUPREME COURT OF THE UNITED STATES

MICHAEL A. SCOTT, *pro se*
TERRY A. SCOTT, *pro se*

Petitioners

v.

SAMUEL I. WHITE, P.C., et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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JURISDICTION STATEMENT

The respondents' contended that Rule 14.1(i) required the Scotts to quote from the record the specific portions where federal questions were raised. The Scotts have alleged the part of the record where they raised the constitutional issues. The respondents have not, nor could they, dispute that the constitutional issues raised in the petition were not raised in the Virginia courts exactly where and how the Scotts contend they were raised. The respondents had a duty under Rule 15 to point out their perceived misstatement of facts and law by the Scotts that would bear on what issues properly would be before this Court. The respondents have addressed the constitutional issues without exception as to the issues having been raised in the Virginia courts.

ARGUMENT SUMMARY

The respondents' argument was premised on their perception of the 2001 order and of the October order rather than on the plain meaning of the actual language employed by the respective courts in those orders. Scott's challenge to the 2001 order does not come too late as this is the first instance in which enforcement of the 2001 order and a contempt order based on it have been made against him.

No where in the October order did the Norfolk Court order that this case be dismissed with prejudice. The respondents' assertion and the trial court's finding of the "intent" of the language of the October order rather than the actual language

employed underscores why the Scotts were denied due process by making for the first time in dismissing this case the finding that it was the intent of the October order that this case be dismissed with prejudice. Ordinarily, intent is a state of mind subject to being rebuffed that should have been resolved, in this instance, by a jury.

ARGUMENT

1. Michael Scott's Challenge To The 2001 Order As Applied Against Him Is Not Time Barred

A. SCOTT DID NOT WAIVE THE RIGHT TO CLAIM THAT 2001 ORDER WAS VOID AS APPLIED TO HIM

The Norfolk Court contempt proceeding was the first time that the 2001 order had ever been enforced against Scott out of which that court rendered the October order. Since the October order was derivative of the enforcement of the 2001 order, it was appropriate for Scott to challenge on constitutional grounds both orders.

Neither the 2001 Petition for Appeal nor the denial of Petition I dealt with the enforcement of the 2001 order against Scott. It is the enforcement of the 2001 order which is the issue here. If the 2001 order is void, then any subsequent order premised on it would be void as well.

B. RES JUDICATA DOES NOT BAR SCOTT'S CHALLENGE TO THE 2001 ORDER AND HOW THAT ORDER HAS BEEN APPLIED

It is noteworthy that Petition I and Petition II referred to in the respondents' brief related to mandamus/prohibition proceedings that involved the criminal contempt for which Scott was being prosecuted. There are two reasons under Virginia law that those petitions can have no preclusive effect.

First, because the petitions dealt with criminal related matters, "a judgment of conviction or acquittal in a criminal prosecution does not establish in a subsequent civil action the truth of the facts on which it was rendered....and such judgment of conviction or acquittal is not admissible in evidence." *Godbolt v. Brawley*, 250 Va. 467, 470, 463 S.E.2d 657, 659 (1995). Second, both petitions were denied because the responding judge's defense was that the acts sought to be compelled or prohibited had already been completed or that Scott could appeal the judge's rulings. *See Winchester & C. R. Co. v. Commonwealth*, 106 Va. 264, 55 S.E. 692 (1906)("An order denying a writ of mandamus is not such a judgment as concludes further inquiry as to the grounds on which the writ is sought.").

The respondents never raised a *res judicata* argument in the trial court and the Scotts so argued that issue in the Supreme Court of Virginia. However, without a written opinion from that court, it cannot be determined how that court treated the

respondents' failure to raise the defense in the trial court as its rules of court would have prohibited consideration of their argument. Nevertheless, all of the elements for application of *res judicata* are lacking: identity of the cause of action, remedies sought, quality of persons, and parties. *Rawlings v. Lopez*, 267 Va. 4, 591 S.E.2d 691 (2004).

2. The Scotts Were Denied Due Process

This Court's Rule 15 required the respondents to point out to this Court in their brief "any perceived misstatement in the petition." Of course, there were no misstatements in the petition.

The most notable of the assertions in the petition was that the trial court found *sua sponte* and as its final act that the Scotts were in violation of the October order. The trial court's final order (App. 3-5) made clear the matters it considered. It was quite clear that the trial court found the Scotts to be in violation of ***only*** the October order as the basis for dismissing this case.

Absent from the respondents' argument was any mention that Landmark demurred to the complaint in this case and also filed a motion for sanctions against Scott based on its assertion that Scott violated the 2001 order when he filed this case. The order dismissing Landmark also denied its motion for sanction. Denial of Landmark's motion for sanctions was an explicit rejection by the trial court of any notion that Scott violated the 2001 order by filing this case and this issue had become law-of-the case. In order to avoid that effect, the

respondents' forum shopped in the Norfolk Court seeking another way to bring the charge against Scott.

A. THE SCOTTS RECEIVED NO NOTICE FROM THE TRIAL COURT

Under Virginia law, "a court may speak only through its written orders." *Clephas v. Clephas*, 1 Va. App. 209, 336 S.E.2d 897 (1985). The trial court issued two orders as to these respondents: an order in July 2008 denying the Scotts' motion for injunctive relief and the final order. No orders exist notifying the Scotts that the trial court was considering them to be in violation of the October order or the 2001 order.

B. THE OCTOBER ORDER IMPOSED CRIMINAL SANCTIONS

The respondents' suggested that it was "important to note that the Norfolk Court...found him in civil contempt." *Resp. Br.*, p. 11. Of course, the Norfolk Court characterized its contempt finding as civil. **What is notable is that the no where in the October order did the Norfolk Court explicitly state that Scott violated the 2001 order or any other order when he filed this case**. The Norfolk Court qualified its civil contempt finding by stating that Scott "abused the permission granted" (App. 41) to defend against the foreclosure that is the subject of this case.

Arguably, this is akin to finding Scott to be in civil contempt "for acting in bad faith" rather than

willfully disobeying the 2001 order. *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982)(A trial court "has the authority to hold [an] offending party in contempt for acting in bad faith or for willful disobedience of its order."). The October order was silent as to whether the basis for the civil contempt was "acting in bad faith" or "willful disobedience." This was a fatal due process deficiency with the order.

C. THE OCTOBER ORDER APPLIED SOLELY TO SCOTT, NOT TO MRS. SCOTT

The relevant portion of the October order stated, "Scott shall dismiss all matters filed by him pending in the Circuit Court of the City of Virginia Beach." (App. 41). There was no mention or finding in the October order regarding Mrs. Scott. *Jetco, Inc. v. Bank of Virginia*, 209 Va. 482, 486, 165 S.E.2d 276, 279 (1969) ("It is well settled that a court may not adjudicate the rights of one who is not a party to the proceeding").

The respondents' speciously contended that "[i]t is not denied that Terry Scott knew of the 2001 Order." *Resp. Br.*, p. 12. It is not admitted that Mrs. Scott knew of the 2001 order. The interveners attempted to get the Norfolk Court to sanction Mrs. Scott during the contempt proceedings and that attempt was rejected out of hand and the presiding judge admonished the interveners not to go there. Neither the Norfolk Court nor the trial court made a finding that "Terry Scott knew of the 2001 Order."

The so-called "tortured path" of the Zephyr property litigation is irrelevant. What the respondents failed to mention (and which is relevant here) was that the District Court in its opinion and order dismissing the prior federal court case related to the Zephyr property expressly stated in a footnote that the Scotts were free to pursue their Zephyr property foreclosure claim in the state court upon disposing of the federal claims, even though the court entered a pre-filing injunction in that case.

Mrs. Scott voluntarily filed a response to the respondents' objection to nonsuit, but only to raise the point that she was not a party to Scott's motion for nonsuit. Mrs. Scott's claims in this case should have gone forward to trial had the trial court allowed Scott to do what the October order required of him—to dismiss all matters filed by him in this case. Scott had no authority to dismiss Mrs. Scott's "matters" and Scott did not need to be a party to Mrs. Scott's contract claim.

3. The Scotts Were Deprived Of Their Property Interests

A. SCOTT HAD A VESTED RIGHT AND PROPERTY INTEREST

The October order had the full force and effect of the law in Virginia. With inherent power, the Norfolk Court bestowed on the interveners and on Scott tangible rights and interests.

The respondents' contended that Scott had no property interest in his right to nonsuit this case

under Virginia Code § 8.01-380(B) because this case was not a validly pending action that could be nonsuited. This argument is meritless and the cases they cited are not on point here. The following were filed and or disposed of by the trial court:

- Demurrer by Landmark;
- Motion to Dismiss by Landmark;
- Motion for Sanctions by Landmark;
- Motion to Dismiss by respondents' Samuel I. White, P.C. and Jason Hamlin;
- Motion for Sanctions by respondents' Samuel I. White, P.C. and Jason Hamlin;
- Motion for Injunctive Relief by the Scotts;
- Objections to Discovery by the corporate respondents;
- Motion for Default Judgment by the Scotts;
- Renewed Motion for Injunctive Relief;
- Motion for Injunctive Relief by Mrs. Scott;
- Objection to Nonsuit by the respondents, except MERS;
- Motion to Dismiss filed by MERS after trial court dismissed case; and
- Motion for Reconsideration by the Scotts.

In this Court is the first time the respondents have ever raised an issue as to the validity of this case and is, therefore, too late, especially when the October order did not explicitly state that Scott violated the 2001 order or any other court order when he filed this case. This Court should not be the final word on this important issue of state law. Even if such an argument was considered, the issues outlined above that were before the trial court and the trial court's disposal of many of the issues belied

the nullity argument and set this case apart from those on which the respondents relied.

The Virginia Legislature bestowed on Scott the right to suffer a nonsuit of this case under Virginia Code § 8.01-380(B) to which he had a legitimate claim of entitlement since all of the statutory prerequisites were met. The Virginia Courts have not declared this case to be illegitimate or a nullity or without legal effect and this Court should decline to do so.

B. CERTAIN RESPONDENTS WERE IN DEFAULT

One thing is clearly admitted by the respondent—they did appear in the trial court on July 8, 2008 "to object to the court's jurisdiction for several reasons." *Resp. Br.*, p. 17. Virginia law is clear as pointed out in the petition that the respondents' should have appeared and actually objected to the trial court's jurisdiction. MERS did not appear at the July 8, 2008 hearing, but did waive service of summons after the contempt proceedings were well underway and in which it did not participate. MERS was in default by virtue of its waiver and failure to timely file responsive pleadings.

The remaining corporate respondents, excepting Samuel I. White, P.C., were in default. Even if their general appearance on July 8, 2008 was not considered, they invoked the trial court's jurisdiction when they filed in August 2008 objections to discovery in this case. Even if the

discovery objections invoking the trial court's jurisdiction were not considered, the Norfolk Court entered the October order on October 28, 2008 and it was not until late December 2008 when they filed the objection to nonsuit in the trial court. Therefore, no matter which event one considers, they were in default by their failure to timely file responsive pleadings. The trial court did not grant MERS leave to file late responsive pleadings and MERS did not ask for leave either.

C. A GENERAL APPEARANCE WAS MADE

The respondents' argument here made clear that they did not object to the trial court's jurisdiction when they appeared on July 8, 2008 and successfully argued for denial of the Scotts' motion for injunctive relief. Their argument that the general district court had exclusive jurisdiction over unlawful detainer actions, though not relevant because they did not make the argument in the trial court, is belied by Virginia Code § 8.01-124 ("Motion for judgment in circuit court for unlawful entry or detainer").

D. RESPONSIVE PLEADINGS WERE REQUIRED TO BE FILED IN THIS CASE

The respondents argued that by timely filing their motion to intervene in the Norfolk Court as opposed to filing responsive pleadings in the trial court, that no further response was necessary in the trial court. The Norfolk Court did not enter an order

until August 7, 2008 (App. 44-47) granting permission to intervene in the Norfolk case. Meanwhile, the decision to permit intervention was purely discretionary and not assured under normal circumstances. The respondents could not pin their refusal to file statutorily mandated responsive pleadings in the trial court on the hope of being allowed to intervene in the Norfolk case.

The respondents' comity argument fails because as noted above, much litigation had occurred in this case long before the Norfolk Court permitted intervention. Significantly, the Norfolk Court refused to stay the proceedings in this case in the August 7, 2008 order (App. 44-47) though the interveners requested a stay. Indeed, recognizing that litigation of this case continued unimpeded, the corporate respondents filed objections to discovery in the trial court after the order was entered rejecting their stay request.

The Scotts had a legitimate claim of entitlement to a default judgment against certain of the corporate respondents by automatic operation of Virginia Supreme Court Rule 3:19(a) when they failed to timely file responsive pleadings. Plainly put, there was no discretion involved and this entitlement accrued long before the Norfolk Court's contempt finding. The respondents' reliance on Virginia Supreme Court Rule 3:8 did not aid their cause. Under the part (b) of that rule, the court did have discretion to permit additional time to file an "answer," but only after having disposed of "all motions, demurrers and other pleas filed by a defendant." And, of course, a motion, demurrer and

plea were considered responsive pleadings that could avoid a defendant's default.

4. The October Order And Dismissal Order Are Void For Want Of Necessary Parties

The interveners invoked the Norfolk Court's jurisdiction with their motion to intervene and for show cause hearing. If they were seeking dismissal of this case against Mrs. Scott, then they should have so asked the Norfolk Court. The Norfolk Court rejected their attempt to obtain sanctions against Mrs. Scott during the contempt proceeding. If the October order was to apply to Mrs. Scott, then she should have been made a party to the contempt proceeding by the Norfolk Court at the behest of the interveners. That was not Scott's burden to carry.

In both the Virginia Supreme Court and in the petition in this Court, the Scotts have been consistent in asserting that the trial court found them to be in violation of the October order without notice and opportunity for a hearing. Mrs. Scott had a legitimate claim of entitlement to her claims in this case for both properties. Contrary to the respondents' contentions, the Zephyr property claim was plainly set out separately in the complaint and alleged solely by Mrs. Scott. The Zephyr property claim related to a contract, i.e., deed of trust, to which Mrs. Scott was a party and Scott did not need to participate in that claim in order for the trial court to award her complete relief.

The bottom-line here is that the respondents invoked the trial court's equity jurisdiction with

their objection to Scott's motion for nonsuit and this case was dismissed. Dismissal of this case directly affected the rights of MERS, Prime Equity and Mr. Edward Barcliff, Jr., neither of whom sought or requested relief and had not yet appeared prior to the dismissal of this case. The law is quite clear as to the requirement for appearance of those defendants under equity jurisdiction. Similarly, neither Mrs. Scott, MERS, Prime Equity nor Mr. Barcliff participated in the contempt proceedings. Consequently, both the October order and the final order in this case are void for want of necessary parties.

CONCLUSION

This is a clear cut case of due process denial by the Virginia courts. The Scotts' request respectfully that the Court grant their petition.

Respectfully submitted,

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